

(21,162.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 156.

OTIS G. FREEMAN, PLAINTIFF IN ERROR,

v.s.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

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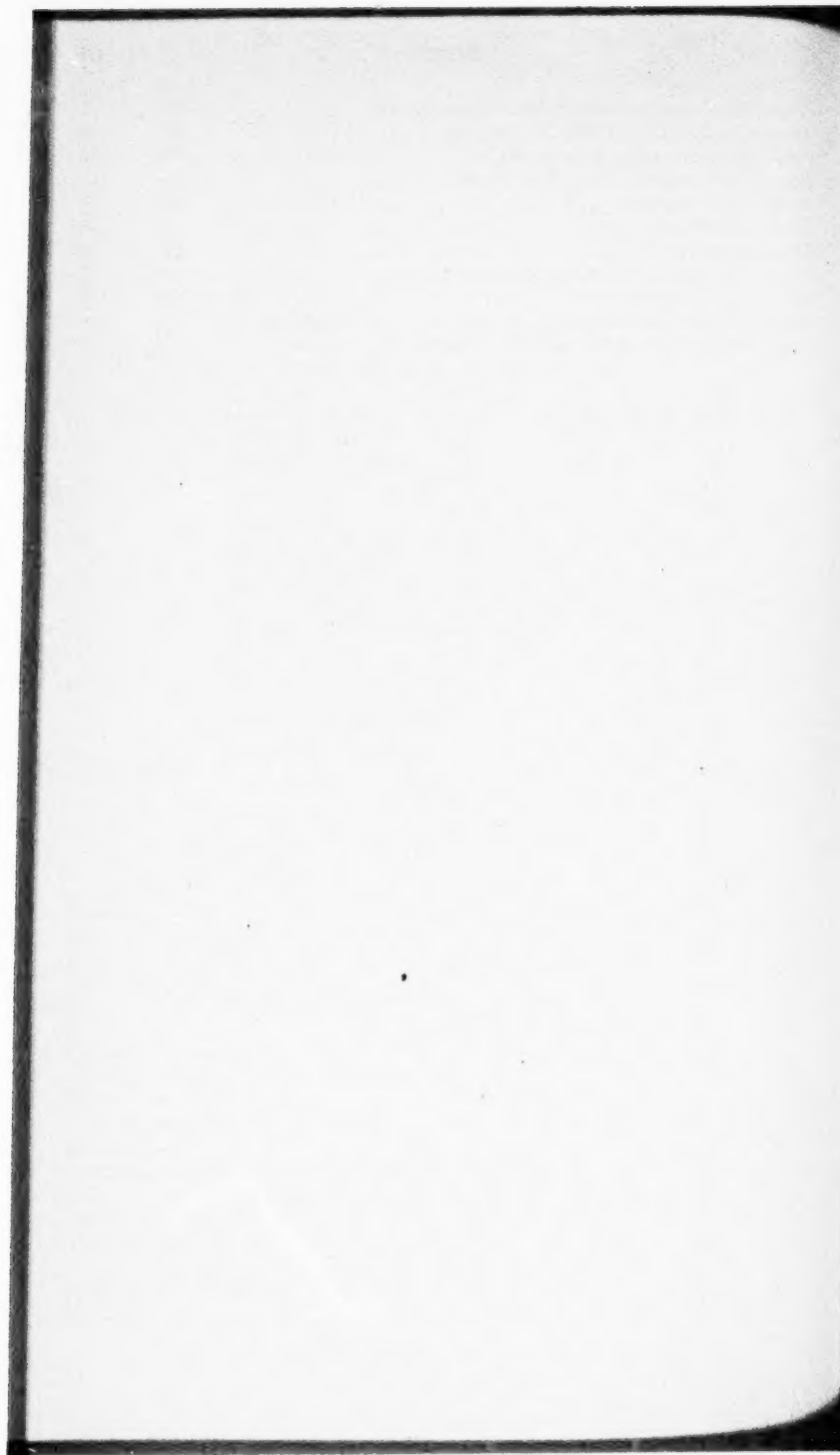
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1 Be it remembered, that on the eighth day of August, 1906, a complaint was filed in the Court of First Instance of the City of Manila of which the following is a copy, to-wit:

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance for the City of Manila.

THE UNITED STATES, Plaintiff,

vs.

OTIS G. FREEMAN, Defendant.

Estafa.

Complaint.

The undersigned accuses Otis G. Freeman of the crime of estafa, committed as follows:

That on or about the 13th day of January, 1906, in the city of Manila, Philippine Islands, the said Otis G. Freeman was then and there a servant, clerk, agent, employee, and manager of the steamship department of Castle Bros., Wolf and Sons, a corporation doing business in the Philippine Islands; that, by virtue of his said duties and employment, there, then and there came into his possession and into his charge large sums of money belonging to the said Castle Bros., Wolf & Sons, which said sums of money were then and there received on deposit, for safe keeping, and under circumstances producing the obligation of delivering and returning the same to the said Castle Bros., Wolf and Sons; that the said Otis G. Freeman then and there willfully, unlawfully and feloniously did of said moneys so received and held under his charge as aforesaid, with intent of profiting thereby, and without the consent of the said Castle Bros., Wolf and Sons, appropriate, misapply and convert to his own use the sum of three thousand five hundred (3,500) pesos,

2 Philippine currency, equivalent and equal to seventeen thousand five hundred (17,500) pesetas, Philippine currency, the property of the said Castle Bros., Wolf and Sons; to the prejudice of the said Castle Bros., Wolf and Sons, in the said sum of three thousand five hundred (3,500) pesos, Philippine currency, equivalent to seventeen thousand five hundred (17,500) pesetas, Philippine currency;

Contrary to the form of the statute in such case made and provided.

(Signed)

GEORGE E. WOLF.

Subscribed and sworn to before me and in my presence, in the city of Manila, P. I., this 8 day of August, 1906, by George E. Wolf.

(Signed)

W. F. NORRIS,

Judge Court of First Instance,

City of Manila.

Witnesses.	Address.
George E. Wolf.....	Castle Bros.—Wolf & Sons.
R. C. Harty.....	do.
Harry Hanford.....	"
A. W. Baum.....	"

Ac/OL—8-8-06.

Bail recommended P5,000.

(On the first page is a stamp: "Court of First Instance Manila, P. I. Aug 8 1906. Clerk's Office.")

That on the same day, to-wit, the eighth day of August, 1906, an order of arrest was issued by the Honorable W. F. Norris, Judge of the Court of First Instance of Manila, Part I; and that on the same day the following order of arrest was also issued to wit:

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of Manila.

No. 2733.

3

THE UNITED STATES
vs.
OTIS G. FREEMAN.

#10 "I" Street.

Order of Arrest.

(Indorsed: Filed 3/15 P. M. Aug. 8, 1906. Sheriff's Office, Manila.)

To any officer of the law:

You are hereby directed to arrest Otis. G. Freeman, said to be in Manila, who has been accused before me of the crime of estafa, and to bring him before me as soon as possible to be dealt with according to the law.

Manila, August 8, 1906.

(Signed)

W. F. NORRIS,
*Judge of the Court of First Instance of
the City of Manila, Part I.*

[SEAL OF THE COURT.]

That on the back of said order of arrest are the following indorsements, to-wit:

Service of Order of Arrest.

United States of America,

City of Manila.

On this date I have arrested Otis G. Freeman, and have placed him at the disposition of the Court.

Manila, August 8, 1906.

(Signed)

JAMES J. PETERSON,

Sheriff of Manila.

Sheriff's fees, P1.12.

I certify that today, August 8, 1906, the accused in this case has filed a personal bond to the satisfaction of the Court, which appears on folio 11 of Book 4 of Bonds, the sureties being Messrs. H. E. Heacock of 42 Plaza Goiti and M. A. Clarke of 2 Escolta, Binondo.

(Signed)

C. A. SOBRAL,

Assistant Clerk.

4 That on the 14th day of August, 1906, the following motion was filed, to-wit:

UNITED STATES OF AMERICA,

Philippine Islands:

In the Court of First Instance of the City of Manila.

Criminal Cause No. —.

THE UNITED STATES, Plaintiff,

vs.

OTIS G. FREEMAN, Defendant.

Motion for Bill of Particulars.

And now comes Otis G. Freeman, the defendant above named, by W. A. Kincaid, his attorney and moves the Court for an order directing that the complaint be made more definite and certain in this to-wit: Said defendant is charged in said complaint with receiving large sums of money on or about the 13th day of January, 1906; and before answering said complaint it is necessary that said defendant be informed of the particular amounts or sums of money received on or about said 13th day of January, 1906, by who said amounts were paid, and whether he, said defendant, is charged with the estafa of one particular amount received from some individual or firm, or whether said sum of thirty-five hundred pesos (P3,500.00) Philippine currency, was made up from other smaller amounts, or otherwise. Until said complaint is made definite and certain in the

particulars aforesaid, it is impossible for said defendant to intelligently answer the same.

Wherefore, defendant prays that said motion be granted.
Manila, P. I., August 11th, 1906.

(Signed)

W. A. KINCAID,
Attorney for Defendant,
26 Plaza Cervantes, Manila.

Received copy this 14th day of August, 1906.

(Sgd.)

AYLETT R. COTTON,
Prosecuting Att'y.

- 5 That on the 15th day of August, 1906, the following document was filed in the Court of First Instance, to-wit:

(Same Title and Heading.)

Affidavit in Support of Motion for Bill of Particulars.

UNITED STATES OF AMERICA,
Philippine Islands, City of Manila, ss:

Otis G. Freeman, having personal cedula Number A1331647 issued at Manila on the 26th day of January, 1906, came before me personally and being duly sworn, on oath, says: That he is the defendant above named; that the complaint in this cause was served upon him, said defendant, on the 8th day of August, 1906, that he has appeared in said cause but has not yet been arraigned; that the subject matter of this action is the alleged embezzlement of the sum of thirty-five hundred pesos on or about the 13th day of January, 1906; that said subject matter is alleged generally in the complaint without stating the particulars of the claim alleged, and defendant cannot safely answer or plead until a bill of particulars shall have been filed, for the reason that he, said defendant, is charged in said complaint with receiving large sums of money belonging to Castle Bros.-Wolf & Sons on January 13th, 1906, and before answering said complaint it is necessary that he, said defendant, be informed specifically regarding the following particulars: (a) A specific statement of the sums of money received by defendant on said 13th day of January; (b) from whom said amounts were received; (c) on what account said sums were paid; and (d) whether said sum of P3500 alleged to have been embezzled by him, said defendant, was received from some particular firm or individual, or whether said alleged sum was made up from other and smaller amounts.

Further deposing defendant says that he intends in good faith to defend this action but is ignorant of the particulars of the claim alleged in said complaint, and that he, said defendant cannot
6 intelligently or safely answer the same until a bill of particulars shall have been filed; and that the particulars stated wherein said complaint is indefinite and uncertain are material and necessary to his defense in this action.

That this affidavit is made in support of the motion heretofore filed on behalf of him, said defendant, and as a part thereof

(Signed)

OTIS G. FREEMAN.

AYLETT R. COTTON.

Subscribed and sworn to before me, this 14th day of August, A. D. 1906, affiant present- his cedula above described.

My Commission expires December 31st, 1906.

THOMAS E. KEPNER,

Notary Public.

That on the 16th day of August, 1906, the following order was made:

(Same Title and Heading.)

This case came on to be heard upon motion for bill of particulars by counsel for the defendant, which motion being submitted to the Court upon argument of the counsel, was overruled.

To which ruling of the court the defendant excepts.

Dated, Manila, P. I., August 16, 1906.

(Signed)

W. F. NORRIS, Judge.

I certify that the parties have notice of the foregoing resolution. Manila, August 16, 1906.

(Signed)

C. A. SOBRAL, Ass't Clerk.

That thereafter, upon what date not appearing, the following application was filed; to-wit:

(Same Title and Heading.)

Application on Behalf of the Defendant for a Subpœna Duces Tecum.

And now comes said Otis G. Freeman, the defendant above named, by W. A. Kincaid his attorney and moves the Court for a
 7 subpœna duces tecum to be directed to George E. Wolf, General Manager of Castle Brothers-Wolf & Sons of Manila, the prosecuting witness in the above entitled cause, directing him, said George E. Wolf to diligently and carefully search for, examine and enquire after, and bring with him and produce at the trial of the above entitled cause on the 27th day of August, 1906, all and singular the day-books, journals and ledgers comprising the books of account of said Castle Brothers, Wolf & Sons, together with all copies, drafts and vouchers relating to said books of account, and all other documents, letters, and papers, writings whatsoever, that can or may afford any information or evidence whatsoever in said cause; then and there to testify and show all and singularly those things which he, said George E. Wolf, knows or the said books of account, documents, drafts, and vouchers do import of, and concerning the above entitled cause.

And to the end that there may be no unnecessary delay in the trial of said cause, it is requested that the Court direct that he, said George E. Wolf deposit in court on or before Thursday, the 24th day of August, 1906, subject to the examination of said Otis G. Freeman, the defendant above named, and his Counsel, the books of account, copies, drafts, vouchers, and documents, aforesaid.

Manila, August 20, 1906.

(Signed)

W. A. KINCAID,

Attorney for Defendant, 26 Plaza Cervantes, Manila.

Received copy Aug. 21st.

(Sgd.)

C. L. BOUVE,

Assist. Pros. Att'y.

That thereafter, subpoenas were served upon George G. Freeman, R. C. Horthy, Harry Hanford and A. W. Baum.

That thereafter in the original record in said cause, the following proceedings appear; to-wit:

8 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance, City of Manila, Part I.

Criminal Case No. —.

THE UNITED STATES
versus
OTIS G. FREEMAN.

Estafa.

Before Hon. W. F. Norris, Judge.

August 8, 1906.

Appearances: Prosecuting Attorney Cotton, for the Government.

GEORGE E. WOLF, sworn by the Court in English to the complaint and to testify:

By Mr. COTTON:

Q. What is your name, residence and occupation?

A. George E. Wolf, 24 Calle Padre Faurer, business address 18 Plaza Moraga, general manager of Castle Bros. Wolf & Sons.

Q. You do a general business in the Philippine Islands?

A. Yes, sir.

Q. Do you know Otis G. Freeman?

A. I do.

Q. Has he been occupying some position in the firm of Castle Bros. Wolf & Sons during the last few years?

A. Yes, sir.

Q. What position?

A. Manager of the Steamship Department.

Q. What were his duties as manager of the steamship department?

A. To receive cash paid in transactions with the steamship companies and keep the accounts.

Q. Can you state if Otis G. Freeman is short in any of his
9 accounts with the firm of Castle Bros. Wolf & Sons?

A. I can.

Q. State from your books or otherwise how much he is short?

A. (Consults books.) On January 13, 1906, he had on hand a total of P12,185.93; he deposited P6,354.09 with the cashier in our office; he paid out P34 for incidentals, P50 to the Captain of the "Gulf of Venice" and should have had on hand a balance of P5,747.84, but he charged the Captain of the "Gulf of Venice" P3,500 which was never paid to the Captain.

Q. How do you know that it was never paid to the Captain of the steamer "Gulf of Venice"?

A. Because on posting from the cash book he charged up to the "Gulf of Venice" P3550 pesos but he credited the "Gulf of Venice" P3500 "in error."

Q. What do the words in the book "in error" mean?

A. Well, supposed to have made a mistake in charging the "Gulf of Venice" with P3500.

Q. In other words he credited himself with having paid the "Gulf of Venice" P3500 and afterwards stated in his own handwriting in the books that he did not pay the master of the "Gulf of Venice" 3500 pesos?

A. Yes, sir.

Q. Are all these books kept in his own handwriting?

A. Yes, sir.

Q. In the City of Manila?

A. Yes, sir.

Q. Has he ever turned into you this P3500?

A. He has not.

Mr. COTTON: That is all.

I hereby certify that foregoing is a true and correct Transcript of the testimony taken by me.

(No signature),
Official Reporter.

10 That thereafter, and on the 21st day of August, 1906, subpoenas were issued to the following, to-wit: George E. Wolf, R. C. Horty, Harry Hanford and A. W. Baum, which said subpoena- was served on the 27th day of August, 1906, as appears by the service certificate of the sheriff thereto attached.

That thereafter, and on the 23rd day of August, 1906, a subpoena- duces tecum was issued to George E. Wolf, which was served, as appears by the sheriff's certificate on the 27th day of the same month.

That thereafter, and on the sixth day of September, 1906, the following proceeding was had in the said cause; to-wit:

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of Manila, Part I.

No. 2733.

THE UNITED STATES

vs.

OTIS G. FREEMAN.

Pleading.

Present the Assistant Prosecuting Attorney of the City, Mr. C. L. Bouve, and the accused in this cause, known as Otis G. Freeman, accompanied by his attorney, Mr. Kepner representing Mr. Kincaid, who waived the reading of the complaint filed against him before this Court for the crime of estafa, a copy of the same having been given him before, and who pleaded "not guilty" of the crime of which he was accused in said complaint.

Manila, September 6, 1906.

(Signed)

C. A. SOBRAL, *Clerk.*

11 That thereafter, and on the 12th day of September, 1906, the following stipulation was filed in the Office of the Clerk of the Court of First Instance, to-wit:

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance for the City of Manila.

Case No. 2733.

THE UNITED STATES, Plaintiff,

vs.

OTIS G. FREEMAN, Defendant.

Estafa.

It is hereby stipulated and agreed, by and with the consent of the Court, that all proceedings in the above entitled case may be conducted in the English language, and that the records of the pleadings, the judgments and all papers need not be translated into the Spanish language.

(Signed)

AYLETT R. COTTON,

Prosecuting Attorney.

W. A. KINCAID,

By THOMAS E. KEPNER,

Attorney for Defendant.

Approved, Manila, 12-Sept. 1906.

(Sgd.) W. F. NORRIS, *Judge.*

That thereafter, and on the 13th day of September, 1906, a bill of particulars was filed in the office of the Clerk of the Court of First Instance, as follows, to-wit:

(Same Title and Heading.)

Bill of Particulars.

The following is a bill of particulars of the sums embezzled on which the complaint on file herein is founded:

That on or about November 1, 1903, the said Otis G. Freeman was employed as a servant, clerk, agent, employee and manager of the steamship department of Castle Brothers, Wolf & Sons; that he held this position from the said date until on or about the 28th day of July, 1903; that as such manager of the steamship department of the said Castle Brothers Wolf & Sons, he had sole custody and control of the books and funds of the steamship department of the said Castle Brothers, Wolf & Sons, and was under the duty and obligation of keeping true books of account of all the receipts and disbursements made by him as such manager of the steamship department of the said Castle Brothers, Wolf & Sons; that the said Otis G. Freeman, on page 6 of the cash book under his sole custody and control, and in which cash book it was his duty to enter all sums of money received and disbursements made by him as manager of the steamship department of the said Castle Brothers, Wolf & Sons, did make an entry dated January 13, 1906, that he then had on hand the sum of P10,719.38; that on the same date, he made the following further entries of money received by him:

"C. B. W. & S. Vale	P50.00
P. M. Co. P/o 12322 Spl. a/c U. S. N.	333.20
" " 12323 Ins. No. 7	312.50
C. B. W. & S. Vale	50.00
Ldg. China 76	9.80
No. 21 2.69 26 .50 41 .50 48 2.85	
68 1.13 70 .50 71 .50 72 1.13	
Gulf of Venice—Frt. 16 Hed. Stock @ £4/— £4	
@ 2/-3/8	630.15
Out Freight. No. 262 Doric 48	80.40
Ldg. Doric 48. No. 1 Younger50"
Making a total of	P12,185.92

That on page 7 of said cash book, and under the said date, January 13, 1906, he did make the following entries of sums of money disbursed by him as aforesaid manager of the steamship department of the said Castle Brothers, Wolf & Sons:

"C. B. W. & S. Deposit 2111 Jan'y 12	P6,354.09
Gulf of Venice Immigration " 8th	4.00
Cash Captain " 11th	3,550.00
Medical Services " 12th	30.00"

That on the same page and under the same date he did make an entry of having cash on hand to the amount of P2,247.84; that the entry of "Cash Captain Jan'y 11th P3550.00, so made in said cash book on said date January 13, 1906, as aforesaid, was a false entry and the said Otis G. Freeman did not on said 11th day of January, 1906, or at any other time, pay to the
13 Captain of the steamship "Gulf of Venice" the sum of P3,550, but then and there did only pay to the said Captain of the said steamship "Gulf of Venice" a sum of money not greater than fifty pesos, Philippine currency; that by this false entry so made as aforesaid, the said defendant was enabled to falsely account for and conceal the embezzlement of the sum of 3500 pesos, Philippine currency, which he embezzled at this time or at some other time, the exact date or dates of the said embezzlement or embezzlements not being known to the undersigned or to Castle Brothers, Wolf & Sons, but only to the defendant; that the defendant appropriated the sum of 3,500 pesos from funds in his possession belonging to the said Castle Brothers, Wolf & Sons while he was employed as manager of the steamship department of the said Castle Brothers, Wolf and Sons, on or about January 13, 1906; that it is impossible for the undersigned or for Castle Brothers, Wolf & Sons to state at what time the defendant embezzled any particular sum of money comprising the said 3,500 pesos, or to show what particular items make up the said 3,500 pesos, or from what particular firm or individual any particular item of this 3,500 pesos was received, as this information is exclusively and solely within the knowledge of the defendant.

(Signed)

AYLETT R. COTTON,
Prosecuting Attorney.

Received copy Manila P. I. this 13th day of September, 1906.

(Signed)

THOMAS E. KEPNER,
For Attorney for Defendant.

That on the 12th day of September, 1906 subpoenas were issued for, and served on the 17th day of the same month upon George W. Wolf, R. C. Harty, Harry Hanford and A. W. Baum to be and appear in the Court of First Instance of Manila, Part 1, on the 20th day of the same month.

14 That thereafter, the date not appearing, a request was made by Mr. Aylett R. Cotton, Prosecuting Attorney, for subpoenas upon the following persons, to-wit:

Miss Jessie Lesser, Theodore J. Arms, Paymaster, U. S. Navy, H. E. Barrett (subpoena duces tecum) C. H. Fulloway, J. L. Pierce, E. W. Bauckham (subpoena duces tecum) and David Collins.

That thereafter, and on September 21st, 1906, the following notice was filed in the office of the Clerk of the Court of First Instance of the City of Manila, to-wit:

(Same Title and Heading.)

To the Defendant, Otis G. Freeman, and to William A. Kincaid, Esq., his attorney:

You and each of you are hereby notified, at the trial of the above-entitled action, which will take place in the Court of First Instance for the City of Manila on the 24th day of September, 1906, or at such other time as the Court may designate to produce the original trial balance of the Shipping Department of Castle Brothers, Wolf & Sons, of date December 31, 1905, to be used as evidence in the above-entitled action; otherwise secondary evidence of its contents will be introduced.

(Signed)

AYLETT R. COTTON,
Prosecuting Attorney.

Received copy Sep. 21, 1906.

W. A. KINCAID,
By J. B., *Chief Clerk.*

That thereafter, and on the 21st day of September, 1906, subpoenas were issued for the following to appear in the Court of First Instance upon the 24th day of September, to-wit:

E. W. Bauckham, Manager Manila Steam Laundry, H. E. Barrett, Treasury Bureau, C. H. Fulloway, J. L. Pierce and 15-222 David Collins, which as shown by the returns of the sheriff thereon were served upon the same day.

And that thereafter in the said record appear exhibits "I," "K," "L," "M," "N," "O," "P," "Q," "R," "S," "T," "U," "V," "W," "X," "Y," "Z," "AA" and "BB," copies of which are attached hereto.

* * * * *

223 Thereafter, and on the 12th day of October, 1906, sentence was rendered in said cause as follows, to-wit:

THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance, City of Manila, Part I.

Criminal Case No. 2733.

THE UNITED STATES
versus
OTIS G. FREEMAN.

Estafa.

Sentence.

In the above entitled case the defendant, Otis G. Freeman, is accused of embezzlement alleged to have been committed on or about

the 13th of January, 1906, in misappropriating and wrongfully converting to his own use the sum of P3,500 Philippine Currency, the property of Castle Brothers, Wolf & Sons, a corporation doing business in the City of Manila, and which money had been deposited with defendant for the use of said Castle Brothers, Wolf & Sons, the defendant being at the time of said conversion, an employee and book-keeper in the service of said Castle Brothers, Wolf & Sons.

The evidence for the Government discloses that the defendant had been in the employment of Castle Brothers, Wolf & Sons for about three years, his services terminating on the 1st of July of the present year. That during this period he was in charge of the Steamship Department of said firm, receiving and disbursing moneys and keeping the books pertaining to said department. The Government submits in evidence, several books of account, consisting of cash books, journals and a ledger kept in the handwriting of defendant and which, it is claimed, show a shortage to the amount complained of, which deficit is unaccounted for by defendant and remains unexplained in said books. The prosecution also introduce certain statements made by defendant to the witnesses Wolf, Baum and Hosty, which it is claimed by the prosecution amount to a confession of defendant's guilt, and which, taken together with the entries in the books, prove conclusively the guilt of the defendant of the crime charged.

The defense admits that certain entries pointed out by the prosecution were erroneous, but that they were not wilfully made, or with the intent to defraud, it being claimed that irregularities arose for the reason that the defendant had not time to keep said books up to date, owing to the fact that he was overworked; that the practical duties of his department so occupied his time that he was unable to properly attend to the keeping of his books and accounts, and that mistakes occurred in consequence for which he should not be held accountable, and that no legal responsibility attaches to him for the entries in said books.

The defendant testifies that Mr. Lowenstein, manager of the business of Castle Brothers, Wolf & Sons, promised, at the time defendant entered the service of said firm, to pay him, defendant, 25% of the profits that might accrue from the steamship department, in addition to his regular salary; that on the 11th of January, the time of the entry of the false charge of P3,500 hereinafter mentioned, the said profits of said department amounted to some P40,000; that defendant's commission on the same as agreed to by Lowenstein, amounted to some P9,000.

The evidence shows that on the 11th of January, 1906, the defendant entered in his cash book, Exhibit "B" for the Government, "Cash paid to the Gulf of Venice, P3,500"; that this entry was false is admitted by defendant and defendant also stated to the witness, Baum, when asked by the latter regarding it, that it was false. The defendant explains this entry, however, by stating it was made for the purpose of keeping the amount of the balance of 2500 pesos (which he admits was shown to be deficient at the time) in his recollection, the 50 pesos being the sum

actually paid the Captain of the said steamer. The defendant testifies that said sum of P3,500 was subsequently transferred to the Insular Government Fund and to the account of the Pacific Mail Steamship Company, but fails to account for its final disposition.

The record also shows that twelve days before the false entry of the 11th of January, to-wit: on the 31st of December, 1905, the defendant struck a trial balance which he alleges was at the request of Mr. Lowenstein, showing a shortage in his accounts of some 3,000 pesos and that on June 30th, 1906, after a conversation with Mr. Wolf regarding the shortage in his books, he made up a trial balance wherein he acknowledged that he was short in his accounts in the sum of P2,078.50. The witness, Wolf, testified that he sent for the defendant to enquire into the condition of his books and that when defendant was accused of being short in his accounts, he admitted the fact but stated that it did not amount to more than 3,000 pesos and that when threatened with prosecution, defendant begged witness to await the arrival of his father, stating that it would kill his wife and father, and requested to assist in the straightening up of the books. Hosty testifies that when the defendant was

shown by him an entry of cash to the Captain of the Gulf of Venice, defendant remarked, "I do not know why I took the money" and in reply to the inquiry as to how much he had taken said, "About 2700 pesos" and also stated in reply to a question, that he did not know from what item he took the same.

The following cablegram sent to Lowenstein by defendant was introduced by the Government:

"Lowenstein, care Castle Brothers, Wolf & Sons, San Francisco; accounts are not in order, it is a large amount, can refund; can you appeal; suspend proceedings until further notice. Freeman."

The defense is interposed that a sum of money was due the defendant from the firm of Castle Brothers Wolf & Sons, exceeding in amount the defalcation complained of, arising from the commission upon the profits promised by Mr. Lowenstein. Without discussing whether such a claim, unliquidated at the time of the alleged offense would be a defense in this prosecution, such claim is not, in the opinion of the Court, established by the evidence. If the contention of defendant is correct, there was due him when he was threatened with prosecution by Wolf, a sum much larger than the shortage complained of. The defendant, however, begged Wolf to desist from prosecution, urging that it would kill his wife and father, but not a word as to the claim that the firm was indebted to him for this or any amount. No reference was made to such claim to any of the employees of the firm when conversing with them and asking their intercession with Mr. Wolf in his behalf. The existence of such claim rests solely upon the testimony of the defendant, who informed his wife and the witness, Hosty, of the agreement of Lowenstein to pay said commission, and whose evidence is based upon such statements of the defendant. It is significant in

227 this action that the cablegram to Lowenstein does not refer to the commission alleged to have been promised by the latter. Defendant states that he made no mention of it for the reason that he supposed Lowenstein was aware of such agreement and,

therefore, reference thereto was unnecessary. The language of the message is not consistent with such theory. Why should defendant offer to refund, if Lowenstein knew that a large amount was due from the firm to defendant?

The explanation of defendant regarding the cablegram, as well as the statement of balances and book entries herein referred to are unsatisfactory and fail to account for the disappearance of funds and the wording of the cablegram. It is, in the opinion of the Court, an indisputable proposition of law, that where the evidence shows that the defendant, as book-keeper for a firm, receives money as such book-keeper to be paid to the firm, and makes an entry thereof in his books, and the book accounts show a shortage, that it is incumbent upon the defendant to account for said shortage, and in case he fails to do so, he is responsible under the law. It is admitted by defendant that he received the sum of 3500 pesos; that he charged it as paid to the Captain of the "Gulf of Venice"; that such entry was false; that said amount was subsequently transferred to different funds. The evidence shows that it remained unaccounted for, and defendant is unable to explain its final disposition from said books. The statements of defendant to the witnesses in this case, taken in connection with the book accounts, amount to a confession of guilt.

The court, therefore, finds, upon a consideration and comparison of all the evidence, that the guilt of defendant is proven beyond a reasonable doubt.

228 The Court therefore finds the defendant, Otis G. Freeman, Guilty of embezzlement of the sum of P3,500 Philippines Currency as charged in the complaint the property of Castle Brothers, Wolf & Sons, and does sentence him to imprisonment — presidio correctional, in the Insular Prison of Bilibid for the period of one year and nine months, and to restore to said Castle Brothers Wolf & Sons, the sum of P3,500 Philippines currency, or in lieu thereof to suffer subsidiary imprisonment for the period of seven months, and to pay the costs of prosecution.

Dated, Manila, P. I. October 12, 1906.

(Signed)

W. F. NORRIS, *Judge.*

The parties were present when the above judgment was rendered, to-day, Oct. 12, 1906.

(Signed)

C. A. SOBRAL,
Ass't Clerk.

That thereafter, and on the 15th day of October, 1906, a motion was filed in the office of the Clerk of the Court of First Instance as follows, to-wit:

(Same Title and Heading.)

Motion for a New Trial.

And the said Otis G. Freeman, the defendant above named, comes now by W. A. Kincaid, his attorney and moves the court for a new trial in the above entitled cause for the following reasons:

I.

The Court erred in finding that the firm of Castle Brothers, Wolf & Sons is a corporation doing business in the City of Manila;

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II.

The Court erred in not finding that said Castle Brothers, Wolf & Sons have no legal existence in the Philippine Islands, because (a) said Castle Brothers, Wolf & Sons is a partnership and not having registered their articles in the Mercantile Registry this action cannot be maintained at the complaint of said firm; (b) the complaint should have charged embezzlement of funds "the property of" (giving the names of the individuals composing said firm) "doing business under the name and style of Castle Brothers, Wolf & Sons;"

III.

The Court erred in not finding that Maurice F. Lowenstein had full power and authority to bind said Castle Brothers, Wolf & Sons by his promise or agreement made on behalf of said firm;

IV.

The Court erred in not finding that the accused and said Lowenstein entered into an agreement on or about the first day of November, 1903, whereby accused became the manager of the steamship department of said Castle Brothers, Wolf & Sons at a salary of two hundred and fifty dollars (\$250.00) United States currency, per month, together with twenty-five percent (25%) of the profits arising from or which might be earned by said steamship department under the management of said accused;

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V.

The Court erred in not finding that the accused is an industrial partner in said firm of Castle Brothers, Wolf & Sons;

VI.

The Court erred in not finding that the evidence in this cause at the most renders the accused liable to a civil action for an accounting; and the Court erred further in not dismissing this action without prejudice to such civil action.

VII.

The Court erred in not finding that said Maurice F. Lowenstein directed the accused to keep his agreement secret from the other employees of said Castle Brothers, Wolf & Sons.

VIII.

The Court erred in not finding that the accused told the witness Hosty at least twenty months before the commencement of this

action of the agreement existing between the accused and said Castle Brothers, Wolf & Sons, and his claim to twenty-five percent of the profits arising from said steamship department.

IX.

The Court erred in not finding that the profits arising from or earned by said steamship department during the management thereof by said accused amount to approximately the sum of
231 forty thousand pesos, and that accused was entitled to twenty-five percent of said sum.

X.

The Court erred in considering the books of account produced by said Castle Brothers, Wolf & Sons on behalf of the Government in this cause as evidence:

- (a) Because said books have never been audited;
- (b) Because it was not shown by any competent evidence that any shortage whatever exists in said books;
- (c) Because said books separated and considered apart from the general books of account of said Castle Brothers, Wolf & Sons are fragmentary and meaningless;
- (d) Because it was shown that many large amounts appearing on said books were in fact paid direct to the cashier of said Castle Brothers, Wolf & Sons and never came into the possession of the accused;
- (e) Because there was no evidence that the accused ever received the sum of thirty-five hundred pesos or any other specific sum;
- (f) Because said books of account were not supported by the original vouchers of any of the transactions which they purport to represent;
- (g) Because no vouchers were produced at the trial of this cause showing that accused had ever received any specific sum for or on account of said Castle Brothers, Wolf & Sons; and,
- (h) Because if said books of account show that said Castle Brothers, Wolf & Sons are entitled to any remedy or relief as against said accused, such remedy is at the very most a civil action for an accounting.

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XI.

The Court erred in holding in effect that the burden of proof rested upon the accused to explain to the satisfaction of the Court the alleged erroneous entries in said books of account.

XII.

The Court erred in not finding that errors in bookkeeping are no evidence whatever of the embezzlement charged.

XIII.

The Court erred in finding that on June 30th, 1906, after a conversation with Mr. Wolf regarding the irregularities in his books,

he, said accused, "made up a trial balance wherein he acknowledged that he was short in his accounts in the sum of P2,078.50."

XIV.

The Court erred in not finding from said trial balance of June 30th, 1906, that the accused had merely overdrawn his salary account in said sum of P2,078.50, and that such overdraft was expressly ratified, confirmed and approved by said Castle Brothers, Wolf & Sons in their letter of August 9th, 1906. (See Defendant's exhibit 1.)

XV.

233 The Court erred in considering the translation of the cablegram sent by the accused to Maurice F. Lowenstein (See, Government's Exhibit K) without reference to the code words used, and without reference to the difficulty of expressing the true meaning of accused by the use of a telegraphic code.

XVI.

The Court erred in finding that the accused appropriated the sum of P3,500.00 as charged in said complaint.

XVII.

The Court having found that the accused appropriated said sum of thirty-five hundred pesos, erred in not finding that said sum of thirty-five hundred pesos was in fact appropriated by him under a bona fide claim of right.

XVIII.

The Court erred in holding that it is "an indisputable proposition of law, that where the evidence shows that the defendant, as bookkeeper for a firm, receives money as such bookkeeper to be paid to the firm, and makes an entry thereof in his books, and the book accounts show a shortage, that it is incumbent upon the defendant to account for said shortage, and in case he fails to do so, he is responsible under the law," because, for the reasons stated in paragraph X of this motion, it has not been established that the "book accounts show a shortage" because until the contrary is shown by competent evidence and beyond all reasonable doubt it is a presumption of law that no such shortage exists; and, because if an audit of said books of account together with the original vouchers were had it is probable that no shortage whatever would appear.

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XIX.

The Court erred in not holding that the accused is presumed to be innocent, that this presumption of innocence is more than sufficient to overcome any apparent irregularities in his books of account, and consequently the Court erred in finding that "the guilt of the defendant is proven beyond a reasonable doubt."

XX.

The accused having invoked the rule requiring the witnesses for the government to leave the court room during the progress of the trial, the Court erred in allowing the witness Baum to remain in the Court room and assist the prosecution in its presentation of the case.

XXI.

The Court erred in not finding that the witness Arthur W. Baum is chief accountant for said Castle Bros.-Wolf & Sons, that as such chief accountant, he and not the accused is responsible for any irregularities which may eventually — shown to exist in the books of the steamship department.

Wherefore, Defendants prays that the judgment and sentence made and entered in this cause on the 12th day of October, 1906, be reversed, stricken from the files and held for naught, and that defendant be adjudged to go hence without day.

Manila, P. I. 13th October, 1906.

(Signed)

W. A. KINCAID,
Attorney for Defendant,
26 Plaza Cervantes, Manila.

Received copy:

(Signed) AYLETT R. COTTON,
Prosecuting Attorney.

235 That thereafter, and on the 16th day of October, the following order was made by the court, to-wit:

(Same heading and title.)

Order.

After an examination of the motion presented by the attorney for the accused in this cause, praying for a new trial of the same; and believing that the reasons adduced in support of the said motion are not pertinent, the said motion is denied; from which decision the defense except.

Manila, October 16, 1906.

(Signed)

W. F. NORRIS, *Judge.*

Be it known that today, the 16th of October, 1906, a copy of the foregoing order was sent to Mr. Kincaid.

(Signed)

C. A. SOBRAL,
Asst. Clerk.

Be it known that the accused in this case, Otis G. Freeman, has given a personal bond, united to folio 154 of bond book No. 1, for appeal; Messrs. M. A. Clark, 2 Escolta and H. E. Heacock of 42 Plaza Goiti, Santa Cruz, being the sureties: to which I certify.

Manila, October 17, 1906.

(Sgd.)

C. A. SOBRAL,
Assistant Clerk.

That thereafter, on the 17th day of October, 1906, an appeal was taken from the foregoing judgment and sentence as follows, to-wit:

(Same title and heading.)

And the said Otis G. Freeman, the defendant above named, comes now by W. A. Kincaid his attorney and appeals from
236 the judgment and sentence rendered in this cause on the 4th day of October, 1906, which said judgment was filed on the 12th day of October, 1906.

Manila, P. I., October 17th, 1906.

(Signed)

W. A. KINCAID,
Attorney for Defendant,
26 Plaza Cervantes, Manila.

Received copy this 17th October, 1906.

(Signed) JESSE GEORGE,
Prosecuting Attorney.

237 And that thereafter, and on the 16th day of January, 1907, the record in the said cause was remitted to the Clerk of the Supreme Court of the Philippine Islands by virtue of said appeal, accompanied by a letter of the Clerk of the Court of First Instance, Mr. J. McMicking.

That on the same day notices of the receipt of said cause in the Supreme Court were sent to the Attorney General and to Mr. W. A. Kincaid, the said cause being numbered 3779 in said Court. That on the 14th day of February, 1907, Mr. W. A. Kincaid attorney for the appellant, made written application for an extension of 30 days in which to file his brief and that such motion was granted by a resolution of the Court on the 16th of the same month.

That thereafter, and on the sixth day of March, 1907, the said attorney filed his brief for the defendant and appellant in the above entitled cause in the Office of the Clerk of the Supreme Court, to which brief was attached the receipt of the Office of the Attorney-General; and annexed thereto was the following assignment of errors, to-wit:

1.

The Trial Court erred in finding that the concern of Castle Brothers, Wolf & Sons is a corporation doing business in the City of Manila.

2.

The trial Court erred in not finding that the concern of Castle Brothers, Wolf & Sons has no legal personality and that no action, civil or criminal, can be sustained in the courts of the Philippine Islands on the complaint or information of said concern.

3.

The Trial Court erred in not finding that Maurice F. Lowenstein was the manager of Castle Brothers, Wolf & Sons and
238 as such had full power and authority to bind said concern by agreement, whether written or by parole, made by him on behalf of said firm.

4.

The Trial Court erred in not finding that appellant entered into an agreement with said Castle Brothers, Wolf & Sons whereby he became manager of the steamship department at a salary of two hundred and fifty dollars per month and 25% of the profits, and the trial court erred further in not finding that such profits approximate the sum of 40,000 pesos during the period from November, 1903, to July 31st, 1906.

5.

The Trial Court erred in not finding that appellant is an industrial partner in the steamship department of Castle Brothers, Wolf & Sons entitled to 25% of the profits earned by said department during his engagement; that as such industrial partner he could not be guilty of embezzlement (*estafa*) of the funds of said department.

6.

The Trial Court erred in not dismissing this cause without prejudice to a civil action for an accounting.

7.

The Trial Court erred in considering the books of accounts as evidence on behalf of the Government in this cause.

8.

The Trial Court erred in holding in effect that the burden of proof rested upon the defendant to explain to the satisfaction of the Court the apparent errors in said books of account.

9.

239 The Trial Court erred in holding that it is an indispensable proposition of law, that where the evidence shows that the defendant as bookkeeper for a firm receives money as such bookkeeper to be paid to the firm, and makes an entry thereof in his books, and the book account shows a shortage, that it is incumbent upon the defendant to account for said shortage and in case he fails to do so, he is responsible under the law."

10.

The Trial Court erred in not holding that the appellant is presumed to be innocent, that this presumption of innocence is evidence of such a character as to overcome any apparent irregularities in the books of account of the steamship department of said concern.

11.

The Trial Court erred in finding that "The guilt of the defendant is proven beyond a reasonable doubt."

12.

The Trial Court erred in finding that on July 30 defendant "made up a trial balance wherein he acknowledged that he was short

in his accounts in the sum of P2078.50", because said trial balance merely shows that appellant had overdrawn his personal account and as appears from defendant's exhibit one such overdraft was expressly recognized as an overdraft by George E. Wolf, General Manager for said Castle Brothers, Wolf & Sons.

13.

The Trial Court having found that appellant appropriated thirty-five hundred pesos erred in not finding that said sum was in fact appropriated by him under a bona fide claim of right.

14.

Appellant having invoked the rule requiring all witnesses to leave the court room during the progress of the trial, the court erred in allowing the witness Arthur W. Baum to remain in the court room and assist the Government in presenting its case.

240 That thereafter and on the 12th day of July, the brief of the Attorney-General was filed in the Clerk's Office, same bearing receipt of Mr. W. A. Kincaid.

That thereafter the said cause was set for hearing on the 19th day of September, 1907, and no one appearing in representation of either party, the case was taken under advisement by the Court.

That thereafter and on the thirteenth day of November, 1907, decision was rendered by the said Supreme Court in said cause, as follows:

241 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 3779.

UNITED STATES

vs.

OTIS G. FREEMAN.

Decision.

This defendant was charged with the crime of estafa in a complaint in the words and figures following:

"That on or about the 13th day of January, 1906, in the city of Manila, P. I., the said Otis G. Freeman was then and there a servant, clerk, agent, employee, and manager of the steamship department of Castle Bros., Wolf and Sons, a corporation doing business in the Philippine Islands; that by virtue of his said duties and employment there, then and there came into his possession and into his charge large sums of money belonging to the said Castle Bros., Wolf & Sons, which sums of money were then and there received on de-

posit, for safe keeping, and under circumstances producing the obligation of delivering and returning the same to the said Castle Bros., Wolf and Sons; that the said Otis G. Freeman then and there willfully, unlawfully and feloniously, did of said moneys so received and held under his charge as aforesaid, with intent of profiting thereby, and without the consent of the said Castle Bros., Wolf and Sons, appropriate, misapply and convert to his own use the sum of three thousand five hundred (3,500) pesos, Philippine currency, equivalent and equal to seventeen thousand five hundred (17,500) pesetas, Philippine currency, the property of the said Castle Bros.,

Wolf and Sons; to the prejudice of the said Castle Bros.,
242 Wolf and Sons in the said sum of three thousand five hundred (3,500) pesos, Philippine currency, equivalent to seventeen thousand five hundred (17,500) pesetas, Philippine currency.

"Contrary to the form of the statute in such case made and provided."

Upon this complaint the defendant was duly arrested on the 8th day of August, 1906, and on the 11th day of August, 1906, presented the following motion for a bill of particulars:

"And now comes said Otis G. Freeman, the defendant above named by W. A. Kincaid, his attorney, and moves the court for an order directing that the complaint be made more definite and certain in this, to-wit: Said defendant is charged in said complaint with receiving large sums of money on or about the 13th day of January, 1906; and before answering said complaint it is necessary that the said defendant be informed of the particular amounts or sums of money received on or about the said 13th day of January, 1906, by whom said amounts were paid, and whether he, said defendant, is charged with the estafa of one particular amount received from some individual or firm, or whether said sum of thirty-five hundred pesos (P3500.00) Philippine currency, was made up from other smaller amounts, or otherwise. Until said complaint is made definite and certain in the particulars aforesaid, it is impossible for said defendant to intelligently answer the same.

"Wherefore, defendant prays that said motion be granted."

This motion for a bill of particulars was duly supported by an affidavit signed by the defendant.

243 This motion for a bill of particulars, on due consideration, was denied by the Judge of the Court of First Instance of the City of Manila, on the 16th day of August, 1906.

Notwithstanding the denial of the motion for a bill of particulars on the part of the lower court, the Prosecuting Attorney on the 13th day of September, 1906, filed a bill of particulars which was as follows:

"The following is a bill of particulars of the sums embezzled on which the complaint filed herein is founded:

That on or about November 1, 1903, the said Otis G. Freeman was employed as a servant, clerk, agent, employee, and manager of the steamship department of Castle Brothers, Wolf & Sons; that he held this position from the said date until on or about the 28th day of July, 1906; that as such manager of the steamship department

of the said Castle Brothers, Wolf and Sons, he had sole custody and control of the books and funds of the steamship department of the said Castle Brothers, Wolf & Sons, and was under the duty and obligation of keeping true books of account of all the receipts and disbursements made by him as such manager of the steamship department of the said Castle Brothers, Wolf & Sons; that the said Otis G. Freeman, on page 6 of the cash book under his sole custody and control, and in which cash book it was his duty to enter all sums of money received and disbursements made by him as manager of the steamship department of the said Castle Brothers, Wolf & Sons, did make an entry dated January 13, 1903, that he then had on hand the sum of P10,719.38; that on the same page and the same date, he made the following further entries of money received by him:

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"C. B. W. & S. Vale	P50.00
P. M. Co. P/O 12322 Spl. a/c U. S. N.....	333.20
" " 12323 Ins. No. 7.....	312.50
C. B. W. & S. Vale	50.00
Ldg. China 76.....	9.80
No. 21 2.69 26 .50 41 .50 48 2.85	
68 1.13 70 .50 71 .50 72 1.13	
Gulf of Venice—Frt. 16 Hd. Stock @ 64 @ 2/-3%....	630.15
Out Freight. No. 262 Doric 48.....	80.40
Ldg. Doric 48. No. 1 Younger50"
Making a total of	P12,185.92

That on page 7 of the said cash book, and under the said date, January 13, 1906, he did make the following entries of sums of money disbursed by him as aforesaid manager of the steamship department of the said Castle Brothers, Wolf & Sons:

"C. B. W. & S.	Deposit 2111	Jan'y 12	P6,354.09
Gulf of Venice	Immigration	" 8th	4.00
	Cash Captain	" 11th	3,550.00
	Medical Services	" 12th	30.00"

That on the same page and under the same date he did make an entry of having cash on hand to the amount of P2,247.84; that the entry Cash Captain, Jan'y 11th—P3,550.00 so made in said cash book on said date January 13, 1906, as aforesaid, was a false entry and the said Otis G. Freeman did not on said 11th day of January, 1906, or at any other time, pay to the Captain of the steamship "Gulf of Venice" the sum of P3,550, but then and there did only pay to the said Captain of the said steamship "Gulf of Venice" a sum of money not greater than fifty pesos, Philippine currency; that by this false entry so made as aforesaid, the said defendant was enabled to falsely account for and conceal the embezzlement of the sum of 3500 pesos, Philippine currency, which he embezzled at this time, or at some other time, the exact date or dates of the said embezzlement or embezzlements not being known to the

undersigned, or to Castle Brothers, Wolf & Sons, but only to the defendant; that the defendant appropriated the sum of 3,500 pesos from funds in his possession belonging to the said Castle Brothers, Wolf and Sons while he was employed as manager of the steamship department of the said Castle Brothers, Wolf & Sons, on or about January 13, 1906; that it is impossible for the undersigned or for Castle Brothers, Wolf and Sons to state at what time the defendant embezzled any particular sum of money comprising the said 3,500 pesos, or to show what particular items make up the said 3,500 pesos, or from what particular firm or individual any particular item of this 3,500 pesos was received, as this information is exclusively and solely within the knowledge of the defendant."

(Signed)

AYLETT R. COTTON,
Prosecuting Attorney."

The defendant was duly arraigned in the court below and plead "Not Guilty" of the crime charged in the said complaint.

After hearing the evidence adduced during the trial of the cause, the lower court found the following facts to be true:

1st. That the defendant had been in the employ of Castle Bros., Wolf and Sons for about three years prior to the first day of July, 1906.

2nd. That during that period the defendant was in charge of the steamship department of said Castle Bros., Wolf and Sons, receiving and disbursing moneys, keeping books pertaining to said department; that these books of account consisted of a cash book, journal and ledger, which were in the handwriting of the defendant.

3rd. That the defendant had made statements to the witnesses Mr. Wolf, Mr. Baum and Mr. Hosty, which statements, taken together with various entries in the books, amounted to a confession of his guilt of the crime charged in said complaint.

4th. That on the 11th day of January, 1906, the defendant entered in his cash book (Exhibit B) "Cash paid to Captain, Gulf of Venice, P3500.00." That this entry was false was admitted by the defendant.

5th. That twelve days before the false entry of the 11th of January, to-wit, on the 31st day of December, 1905, the defendant struck a trial balance showing a shortage in his accounts of about P3,000.00.

6th. That on the 30th day of June, 1906, the defendant made another trial balance wherein he acknowledged that he was short in his accounts in the sum of P2,078.50.

7th. That the defendant, a few days after the trial balance of June 30th, 1906, admitted to the witness Wolf, that he, the defendant, was short in his accounts, but insisted that the shortage did not exceed the sum of P3,000.00.

8th. The defendant said to the witness Hosty, "I don't know why I took the money," and in addition stated that he had taken about P2700.00 but did not know from what account said sum was taken.

9th. That the contention of the defendant that he was to receive from Castle Bros., Wolf & Sons a portion of the profits resulting from

the "Steamship department of the said firm," and that the firm of Castle Bros., Wolf and Sons owed him, the defendant, a much larger sum than the said shortage, was not supported by the evidence.

Upon these facts the lower court found the defendant guilty of the crime charged in said complaint and sentenced him to be imprisoned for a period of one year and nine months of presidio correccional, and to restore to Castle Bros., Wolf and Sons the
247 sum of P3500.00, or in lieu thereof to suffer subsidiary imprisonment for a period of seven months and to pay the costs of the prosecution. From this sentence the defendant appealed to this court and made the following assignments of error:

1st. The Court erred in finding that the concern of Castle Bros., Wolf and Sons is a corporation doing business in the City of Manila.

2nd. The Court erred in not finding that the concern of Castle Bros., Wolf & Sons has no legal personality and that no action, civil or criminal can be sustained in the courts of the Philippine Islands on the complaint or information of said concern.

3rd. The Court erred in not finding that Morris F. Lowenstein was the manager of Castle Bros., Wolf and Sons and as such had full power and authority to bind said concern by agreement whether written or by parole, made by him on behalf of said firm.

4th. The Court erred in not finding that the appellant entered into an agreement with said Castle Bros., Wolf and Sons, whereby he became manager of the steamship department at a salary of \$250.00 per month and 25% of the profits; and the trial court erred further in not finding that such profits approximated the sum of P40,000.00 during the period from November, 1903, to July 31st, 1906.

5th. The trial court erred in not finding that the appellant is an industrial partner in the steamship department of Castle Bros., Wolf and Sons and entitled to 25% of the profits earned by said
248 department during his management; that as such industrial partner he could not be guilty of embezzlement (estafa) of the funds of said department.

6th. The trial court erred in not dismissing this action, without prejudice to a civil action for an accounting.

These assignments of error may be classified under two heads, the first, including the first and second, relating to the existence of Castle Bros., Wolf and Sons as a legal entity, and the second, including the 3rd, 4th, 5th and 6th, relating to the alleged relation existing between the defendant and the said entity of Castle Bros., Wolf and Sons.

With reference to the first assignment of error, the defendant admits that he entered into the employment of the alleged firm or corporation, whichever it may be, at a fixed salary, and received large sums of money belonging to the same. Admitting this fact on the part of the defendants, it does not require much argument to show that he thereby incurred the obligation to turn over to said firm or corporation such sums of money so received, and that a failure so to do rendered him liable under the provisions of the Penal Code. (Paragraph 5, Article 535.) U. S. vs. Cockrill, No. 2330.

With reference to the second group of assignments of error, the only evidence adduced during the trial to show that the defendant was entitled to a percentage of the profits resulting from the management of the department over which he had control as an employee of said firm or corporation, was his own statements. The fact was strenuously denied by Mr. Wolf, manager of the said firm or corporation. The defendant claimed that he was entitled to 25% of the profits, which he alleged were about P40,000.00 during the two years and more of employment on the part of the defendant, but notwithstanding the fact that he was claiming such a large sum of
249 money no mention of the same was ever made to Mr. Wolf, the manager, nor did he ever make any entries in his books indicating that the company owed him this sum, or any other sum growing out of the profits of the business. Upon the contrary, the books show, according to his own statement, that he was indebted to the firm in the sum of P2,087.50.

If the defendant had been entitled, as a matter of fact, to a percentage of the large profits which his department had earned, which was more than enough to cover his shortage, why did he not call the attention of Mr. Wolf to this fact at the very earliest opportunity, when the latter confronted him with a shortage in his accounts. During the time Mr. Wolf was investigating the condition of the accounts of the defendant, the latter sent a cablegram to Mr. Lowenstein, who was then in the United States, in the words following:

"Lowenstein, c/o Castle Bros., Wolf & Sons, San Francisco:

"Accounts are not in order. It is a large amount. Can refund. Can you appeal. Suspend proceedings until further notice.

FREEMAN."

The defendant in his testimony stated that his arrangement with the firm or corporation by which he was to receive a percentage of the profits had been made with Mr. Lowenstein; yet notwithstanding that fact, in the above cablegram he fails to demand from Mr. Lowenstein a compliance with the alleged agreement or contract. We are unable to find in the record sufficient proof to sustain the contention of the defendant that he was to share in the profits resulting from his management of the particular business under his control.

250 The lower court found that the defendant had appropriated to his own use out of the moneys received in his capacity as employee of the firm of Castle Bros., Wolf and Sons, the sum of P3500.00. The defendant, during the trial in the lower court, attempted to show that at times money which was due his department was paid directly to the cashier of the firm of Castle Bros., Wolf and Sons, and that, therefore, he had no account of such receipts. This fact was admitted by the cashier, so that we are unable to find that the amount of funds appropriated by the defendant was equal to P3500.00.

The defendant admitted to several of the witnesses who appeared during the trial that he was short in his accounts in a sum equal of

from P2700.00 to P3000.00. The defendant himself in a trial balance made on or about the 30th of June, 1906, after he knew that his accounts were being investigated by his employer, acknowledged over his own signature that he owed the firm the sum of P2078.50. This trial balance seems to constitute proof positive that he had received this sum for the benefit of his employer, and which he had not, upon request, returned to said employer.

We are of the opinion and so hold that the evidence shows, beyond peradventure of doubt, that the defendant did receive the sum of P2078.50, while acting as employee of the firm of Castle Bros., Wolf and Sons, with the obligation to return the same to said firm. This finding, of course, will in no way estop the said firm of Castle Bros., Wolf and Sons from recovering in a civil action from the defendant any sum or sums in excess of this amount which are found to be due to the said firm. The only charge which this
251 finding makes in the conclusion of the lower court is in the amount of money which must be returned to the firm of Castle Bros., Wolf and Sons by virtue of this sentence.

It is the judgment of this court that the sentence of the lower court be affirmed with this modification, and that the defendant be sentenced to be imprisoned for a period of one year and nine months of presidio correccional, and to restore to Castle Bros., Wolf and Sons the sum of P2078.50, or in lieu thereof to suffer subsidiary imprisonment for a period not to exceed one-third of the principal penalty, and to pay the costs.

It is so ordered.

(Signed)

E. FINLEY JOHNSON.

We concur:

(Signed) C. S. ARELLANO.
" FLORENTINO TORRES.
" A. C. CARSON.
" CHARLES A. WILLARD.
" JAMES F. TRACEY.

That thereafter and on the 13th day of November, 1907, notice of such decision was sent to the Attorney-General and to Mr. W. A. Kincaid, attorney for the appellant.

That on the 14th day of November, 1907, the following was filed in the Clerk's Office of the Supreme Court, to-wit:

(Same title and heading.)

Now comes the accused and appellant in the above entitled cause and excepts to the decision of the Court dictated in the same.

It is therefore prayed that this exception be received as interposed in due time and form.

Manila, November 14, 1907.

252

(Signed)

W. A. KINCAID,

Attorney for Accused and Appellant.

Received Copy:

(Signed) ISIDRO PAREDES, *Ass't Att'y.*

That on the 18th day of November, 1907, a copy of the following was remitted by the Acting Clerk of the Supreme Court to the Attorney-General and Mr. W. A. Kincaid, to-wit:

SIR: This Court in session the 15th inst., resolved as follows:

"Having examined the document presented by Mr. W. A. Kincaid, excepting to the decision dictated by this Court on the 13th instant, in case No. 3779, The United States vs. Otis G. Freeman, for the crime of estafa, the Court says: Unite this document to the record in order that it may appear for proper effect."

Of which I inform you for your information."

That thereafter and on the 23rd day of November, the following motion for a new trial was presented in the Office of the Clerk of the Supreme Court, to-wit:

R. G. No. 3779.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,
versus
OTIS G. FREEMAN, Defendant and Appellant.

Motion for Rehearing.

Comes the accused and appellant and excepts to the decision dictated in this cause the 13th of November, 1907, and prays
253 the Court to grant a rehearing for the following reasons:

I.

The Court erred in holding that the proofs were sufficient to convict the accused.

II.

The Court erred in refusing to consider the first two assignments of error specified in the brief of the accused, which are here reiterated and made a part hereof.

III.

The Court erred in finding that the accused incurred the obligation of delivering to the firm or corporation of Castle Brothers, Wolf & Sons the sums mentioned in said decision.

IV.

The Court erred in not finding that the accused and appellant entered into a contract with said Castle Brothers, Wolf & Sons, by which he became manager of the steamship department, at a salary of \$250.00 and 25% of the profits; and the court further erred in

not finding that the said profits amounted approximately to the sum of 40,000 pesos during the period between November, 1903, to the 31st of July, 1906.

V.

The Court erred in not finding that the appellant is an industrial partner of the steamship department of Castle Brothers, Wolf & Sons, entitled to receive 25% of the profits realised by the said department during his management, and that as such industrial partner he could not be guilty of the embezzlement of the funds of such department.

254

VI.

The Court erred in finding that the accused and appellant received the sum of 2087.50.

VII.

N

The Court erred in finding that the accused incurred the responsibility provided by the Penal Code in paragraph 5, article 535.

VIII.

The Court erred in not dismissing this case, without prejudice to the right to institute a civil action for the rendition of the accounts.

IX.

The Court erred in affirming the sentence of the trial court, that the accused should be sentenced to one year and nine months of presidio correccional and to return to Castle Brothers, Wolf & Sons the sum of 2078.50, or otherwise to suffer subsidiary imprisonment for a period of not to exceed a third part of the principal penalty, and to pay the costs.

Manila, November 23, 1907.

(Signed)

KINCAID & HURD,
Attorneys for Appellant.

Received Copy today, Nov. 23, 1907.

(Signed) JOVITO YUSAY,
Ass't Attorney.

Thereafter, and on the 26th day of November, 1907, the following notice was sent to the Attorney-General and to Messrs. Kincaid & Hurd, to-wit:

SIR: The Supreme Court in session the 25th instant, adopted the following resolution:

"After an examination of the document presented by Messrs. Kincaid and Hurd, in case No. 3779, The United States vs. Otis G. Freeman, pra-ing that, for the reasons therein set out, a new hearing be granted by this Court upon the decision rendered the 13th instant, the Court says: The same is denied."

255 Which is furnished you for your information.

That on the 26th day of November, 1907, final judgment was entered in said cause as follows, to-wit:

UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiffs and Appellees,

vs.

OTIS G. FREEMAN, Defendant and Appellant.

Final Judgment. November 26, 1907. Judgment Book 5, F. Register No. 3779.

This Court having acquired the due jurisdiction to hear the above entitled cause, which has been submitted by both parties for decision, and after a review by this Court of the record, its decision and order for final judgment having been filed on the thirteenth day of November, one thousand nine hundred and seven;

By virtue of said order the decision appealed from the Court of First Instance of Manila, dated the twelfth of October, one thousand nine hundred and six is hereby modified, and the accused is sentenced to be imprisoned for a period of one year and nine months of presidio correccional, and to restore to Castle Bros., Wolf & Sons the sum of P2078.50, or in lieu thereof to suffer subsidiary imprisonment for a period not to exceed one-third of the principal penalty, and to pay the costs (which amount to twelve dollars, gold), for the collection of which the Judge of the First Instance will proceed according to law.

It is further ordered that said cause be returned to the Court of its origin for proper action.

[Seal of Supreme Court.]

(Signed)

256

R. HERAS,
*Acting Clerk of the Supreme Court
of the Philippine Islands.*

Thereafter, and on the 27th day of November, there was filed in the Clerk's Office of the Supreme Court the following exception; to-wit:

(Same Title and Heading.)

Now comes the accused and appellant and excepts to the resolution of the Court denying the motion for a new trial presented in this cause.

Therefore it is prayed that the Court admit this exception as interposed in due time and form.

Manila, November 27, 1907.

(Signed)

KINCAID & HURD,
Attorneys for Accused and Appellant.

Received copy, same date,

(Sgd.) ISIDRO PAREDES,
Ass't Att'y.

That on the same date the following exception was also filed in the Office of the Clerk, to-wit:

(Same Title and Heading.)

Now comes the accused and appellant and excepts to the final judgment dictated in said cause.

Therefore it is prayed that the Court admit this exception as interposed in due time and form.

Manila, November 27, 1907.

(Signed)

KINCAID & HURD,
Attorneys for Accused and Appellant.

Received copy this date.

(Sgd.) ISIDRO PAREDES,
Ass't Att'y.

Thereafter, and on the 30th of November, 1907, the following notice was sent to the Attorney-General and Messrs. Kincaid and Hurd, to-wit:

SIR: This Court, in session the 29th instant, adopted the following resolution:

"After an examination of the exceptions presented by Messrs. Kincaid & Hurd to the resolution of this Court denying the motion for a new trial dated the 25th instant, and against the final judgment entered on the 26th of this month, in cause No. 3779, The United States vs. Otis G. Freeman, for the crime of estafa, the Court says: unite these documents to the proper record in order that they may appear and have proper effect.

Which I transmit to you for your information.

(Signed)

R. HERAS,
Acting Clerk, Supreme Court, P. I.

Thereafter and on the sixth day of December, 1907, the following was filed in the Office of the Clerk of the Supreme Court, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,

vs.

OTIS G. FREEMAN, Defendant and Appellant.

Comes Otis G. Freeman, defendant and appellant in the above entitled cause and represents:

I.

That judgment has been rendered in said cause by which the judgment of the Court of First Instance convicting the petitioner Otis G. Freeman for the offense of embezzlement to one year and nine months imprisonment, to restore to Castle

Brothers Wolf & Sons the sum of P2500.00 or suffer subsidiary imprisonment for the period of nine months, in violation of the Philippine Bill as appears from the accompanying assignment of errors.

II.

Wherefore the petitioner prays that he be granted a Writ of Error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands with a supersedeas of the judgment, and that upon the execution and approval of a bond in such sum as may be deemed sufficient, conditioned as required by law, he be admitted to bail pending such Writ of Error, in order that the judgment may be revised by the Supreme Court of the United States upon the assignment of errors presented with this petition.

He also prays that the record of the cause be ordered translated from Spanish to English in conformity with the rule prescribed by the Supreme Court of the United States.

(Signed)

KINCAID & HURD,
Attorney for Petitioner.

That at the same time, and in connection therewith, the following assignment of errors was filed, to-wit:

UNITED STATES OF AMERICA:

Supreme Court of the United States, Washington, D. C.

OTIS G. FREEMAN, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

259

Assignment of Errors.

Comes now the accused and states to the Court that in records and proceedings in this case manifest errors *has* been committed, that is to say:

I.

The Court erred in holding that the evidence was sufficient to justify the conviction of the defendant.

II.

The Court erred in refusing to consider the first two assignments of error specified in the brief of the accused which assignments are hereby made a part hereof.

III.

The Court erred in finding that the accused incurred the obligation of delivering the sums mentioned in the said decision to the firm or corporation of Castle Bros. Wolf & Sons.

IV.

The Court erred in refusing to find that the accused and appellant entered into a contract with said Castle Brothers Wolf and

Sons, by which he became the manager of the steamship department with a salary of two hundred and fifty dollars and twenty five per cent of the earnings; the Court also erred in refusing to find that said earnings amounted to approximately forty thousand pesos during the period between November, 1903 and July 31, 1906.

V.

The Court erred in refusing to find that the appellant is an industrial partner of the steamships department of Castle Brothers Wolf and Sons entitled to receive 25% of the earnings realized by said department during the time the same is earned, and that as such industrial partner he could not be guilty of the embezzlement of the funds of said department.

260

VI.

The Court erred in finding that the accused received the sum of 2087.50.

VII.

The Court erred in finding that the accused incurred the responsibility provided in Article 533, paragraph 5 of the Penal Code.

VIII.

The Court erred in refusing to dismiss this cause without prejudice to the right to institute a civil action for the rendition of accounts.

IX.

The Court erred in affirming the judgment of the Court of First Instance and the sentencing of the accused to one year and nine months of presidio correccional and to repay to Castle Brothers Wolf and Sons the sum of 2087.50 or otherwise to suffer subsidiary imprisonment for a period not to exceed a third part of the principal penalty and to pay the costs.

X.

The evidence does not show that the accused is guilty of the crime charged beyond a reasonable doubt.

XI.

The Court erred and violated the Constitutional Law of the Philippines (The Act of Congress of July 1st, 1902) in sentencing the accused in this case to suffer subsidiary imprisonment which sentence is in effect that of imprisonment for debt.

Manila, November 30, 1907.

(Signed)

KINCAID & HURD,
Attorneys for the Plaintiff in Error.

261 Thereafter the following writ of error was allowed, to-wit:

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Supreme Court of the Philippine Islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Philippine Islands, before you, or some of you, between the United States, plaintiff and appellee, and Otis G. Freeman, defendant and appellant, a manifest error hath happened to the great damage of the said Otis G. Freeman, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the — day of — 1908, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause to be done therein to correct that error, what of right,

and according to the law and customs of the United States
262 should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States the — day of — in the year of our Lord, 1907.

*Clerk of the Supreme Court of the
Philippine Islands.*

The foregoing writ of error is allowed and it shall operate as a supersedeas of the judgment complained of, and upon the execution of a bond by Otis G. Freeman in the sum of Six Thousand pesos payable to the defendant in error, conditioned as required by law, to be approved by me, he shall be entitled to his liberty pending such writ of error.

(Signed)

E. FINLEY JOHNSON,
*Associate Justice of the Supreme Court of the
Philippine Islands.*

That thereafter in the said record, the following citation appears, to-wit:

THE UNITED STATES OF AMERICA, ss:

To Attorney General for the Philippine Islands:

You are hereby cited and admonished to be in and appear at the Supreme Court of the United States, to be holden at Washington, within one hundred and twenty days from the date of this citation, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the Philippine Islands, wherein Otis G. Freeman is plaintiff in error, and the United States defendant in error, to show cause

if any there be, why the judgment in said Writ of Error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

263 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 6th day of December, in the year of Our Lord, 1907.

(Signed)

E. FINLEY JOHNSON,
*Associate Justice of the Supreme Court of the
Philippine Islands.*

I admit the receipt of a copy of the above citation and accept service thereof as though regularly had this 6th day of December, 1907.

(Signed)

GREGORIO ARANETA,
Attorney General for the Philippine Islands.

And that on the sixth day of March, 1908, there was filed in the Office of the Clerk of the Supreme Court, an enlargement of the time, of which the following is a copy, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

R. G. No. —.

O. G. FREEMAN, Plaintiff in Error,
vs.

THE UNITED STATES, Defendant in Error.

Good reasons appearing therefor, it is hereby ordered that the time for returning, docketing and filing the writ of error allowed by me in the above entitled cause, in the Supreme Court of the United States, be enlarged so that the same shall not expire before the first day of May, 1908.

Done in Manila the 6th day of March, 1908.

(Signed)

E. FINLEY JOHNSON,
*Associate Justice, Supreme Court,
Philippine Islands.*

264 That thereafter and on the 13th day of March, 1908, the following stipulation was filed in the Clerk's Office of the Supreme Court, to-wit:

UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court.

No. 3779.

THE UNITED STATES, Plaintiff,
vs.
OTIS G. FREEMAN, Defendant.

Stipulation and Agreement.

It is hereby stipulated and agreed that the exhibits in the above entitled case be not included in the record elevated to the Supreme Court of the United States, their consideration being unnecessary in the determination of the questions involved.

(Signed)

GREGORIO ARANETA,
Attorney for the Government.

(Signed)

KINCAID & HURD,
Attorneys for the Defendant.

That thereafter and on the 14th of the same month, the Supreme Court of the Philippine Islands approved said stipulation by a resolution of that date. And that thereafter the following order was made, to-wit:

UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court.

No. —.

THE UNITED STATES, Plaintiff,
vs.

265

OTIS G. FREEMAN, Defendant.

Order.

It appearing that although the record in this case has been completed for transmission to the Supreme Court of the United States, owing to an unusual delay of more than two weeks in the shipment of mail to the United States it would be impossible for the record to reach Washington within the time already fixed by this Court, it is hereby ordered that the time for the presentation of such record in Washington be extended to and including the twentieth day of May, 1908.

(Signed)

E. FINLEY JOHNSON,
Judge Who Granted the Writ of Error.

Dated at Manila, P. I. March 21, 1908.

[Seal of the Supreme Court.]

266 That thereafter and on the 31st of March, 1908, there was filed in the office of the clerk of the Supreme Court a stipulation, of which the following is a copy; to-wit:

UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court.

R. G. No. —.

THE UNITED STATES, Plaintiff,
vs.
OTIS G. FREEMAN, Defendant.

Stipulation and Agreement.

It is hereby stipulated and agreed that the books of account which were presented as exhibits in the above entitled case be not included in the record elevated to the Supreme Court of the United States, their consideration being unnecessary in the determination of the questions involved.

Manila, March 31, 1908.

(Signed)

GREGORIO ARANETA,
Attorney General.
KINCAID & HURD,
Attorneys for the Defendant.

"

267 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Supreme Court of the Philippine Islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Philippine Islands, before you, or some of you, between the United States, plaintiff and appellee, and Otis G. Freeman defendant and appellant, a manifest error hath happened to the great damage of the said Otis G. Freeman, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the Fourth day of April, 1908, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and customs of the

268 United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of

the United States the Sixth day of December in the year of Our Lord, 1907.

[Seal Corte Suprema, Islas Filipinas.]

R. HERAS,
*Acting Clerk of the Supreme Court
of the Philippine Islands.*

The foregoing writ of error is allowed and it shall operate as a supersedeas of the judgment complained of, and upon the execution of a bond by Otis G. Freeman in the sum of six thousand pesos payable to the defendant in error, conditioned as required by law, to be approved by me, he shall be entitled to his liberty pending such writ of error. Dated this 6th day of December, 1907.

E. FINLEY JOHNSON,
*Associate Justice of the Supreme Court
of the Philippine Islands.*

269 THE UNITED STATES OF AMERICA, ss:

To Attorney General for the Philippine Islands:

You are hereby cited and a-monisged to be in and appear at the Supreme Court of the United States, to be holden at Washington, within one hundred and twenty days from the date of this citation, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the Philippine Islands, wherein Otis G. Freeman is plaintiff in error, and the United States defendant in error, to show cause if any there be, why the judgment in said Writ of Error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 6th day of December in the year of Our Lord, 1907.

[Seal Corte Suprema, Islas Filipinas.]

E. FINLEY JOHNSON,
*Associate Justice of the Supreme Court
of the Philippine Islands.*

I admit the receipt of a copy of the above citation and accept service thereof as though regularly had this 6th day of December, 1907.

GREGORIO ARANETA,
Attorney General for the Philippine Islands.

270 THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that in a certain cause pending in said Court, wherein Otis G. Freeman was appellant, and the United States was appellee, a final judgment was rendered by said Supreme

Court on the twenty-sixth day of November, A. D. 1907, in favor of the said The United States, and against the said Otis G. Freeman, and that on the sixth day of December, A. D. 1907, said Otis G. Freeman sued out a writ of error to said Supreme Court, directed to remove said cause to the Supreme Court of the United States.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court this sixteenth day of March, A. D. 1908.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,

Clerk of the Supreme Court of the Philippine Islands.

271 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,

vs.

OTIS G. FREEMAN, Defendant and Appellant.

Bond.

Whereas Otis G. Freeman defendant and appellant in the above entitled cause has been found guilty in the Supreme Court of the Philippine Islands of the crime of estafa and has obtained a writ of error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands for the reversal of said sentence, and

Whereas by order of the Honorable E. Finley Johnson, Justice of the Supreme Court of the Philippine Islands who granted the said writ of error said Otis G. Freeman has been granted his liberty provisionally during the prosecution of said writ of error, under bond in the sum of six thousand pesos Philippine Currency.

Now therefore we Otis G. Freeman as principal and Lionel D. Hargis, C. C. Brower, M. A. Clarke and Emily A. Mobley as sureties obligate ourselves jointly and severally by these presents that said above named Otis G. Freeman will pay any fine which the

272 Supreme Court of the United States may order or that he will surrender himself for the execution of the judgment which said Court may render, or in case the cause be remitted for a new trial that he will appear before the court to which the cause may be remitted and submit to the orders and process of the same, or in case he shall fail to comply with any of these conditions that he will pay to the United States the sum of six thousand pesos, Philippine currency.

In witness whereof we have executed this instrument this 9 day of December, A. D. 1907.

(Signed)

"

"

"

"

OTIS G. FREEMAN.

M. A. CLARKE.

EMILY A. MOBLEY.

LIONEL D. HARGIS.

C. C. BROWER.

PHILIPPINE ISLANDS,
City of Manila:

Before me the undersigned authority on this day personally appeared M. A. Clarke and Emily A. Mobley who being first duly sworn on oath say that they are the persons who executed the foregoing bond that they are solvent and the owners of real property in the Philippine Islands, and that each of them is the owner of property of the value stated in said bond exclusive of all his debts and obligations and exclusive of property exempt from execution.

(Signed)

M. A. CLARKE.

EMILY A. MOBLEY.

Subscribed and sworn to before me this 9 day of December, A. D. 1907; said affiants presented their respective cedulas No. A 1500210 issued March 7, 1907, at Manila. Emily A. Mobley presented no cedula, same not being necessary under law.

[Seal of Supreme Court & revenue stamp.]

(Signed)

SAM FERGUSON,

Deputy Clerk of the Supreme Court of the Philippine Islands, ex-Officio Notary Public.

I hereby consent to and approve of the execution of the foregoing instrument by my wife Emily A. Mobley.

(Signed)

SETH P. MOBLEY.

Approved,

(Signed)

E. FINLEY JOHNSON,

Associate Justice Supreme Court.

273 THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing two hundred and seventy-two pages are a true and correct transcript of the record in the case of The United States vs. Otis G. Freeman, R. G. No. 3779, including the original writ of error, allowance thereof, and my certificate of such allowance, copy of the writ of error bond, and copies of exhibits "I, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, and BB, of the Government, and exhibit No. 1 of the defense.

In witness whereof I have this day signed my name and affixed the seal of the said Supreme Court in Manila, Philippine Islands, the first day of April, A. D. 1908.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,

Clerk of the Supreme Court of the Philippine Islands.

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In the Supreme Court of the United States.

October Term, 1909.

No. 156.

OTIS G. FREEMAN, Plaintiff in Error,

vs.

THE UNITED STATES.

In above entitled cause, it is hereby stipulated that the Clerk may cause the transcript of record to be printed, omitting the testimony and exhibits embraced in pages 16 to 222 inclusive in the transcript of record.

A. B. BROWNE,
ALEX. BRITTON,
B.,

Attorneys for Plaintiff in Error.

J. A. FOWLER,

As't Att'y Gen'l.

Sept. 13, '09.

275 [Endorsed:] File No. 21,162. Supreme Court U. S. October Term, 1909. Term No. 156. Otis G. Freeman, Pl'ff in Error, vs. The United States. Stipulation to omit part of record in printing. Filed Sept. 14th, 1909.

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JAMES H. McKENNEY,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 156.

OTIS G. FREEMAN, PLAINTIFF IN ERROR,

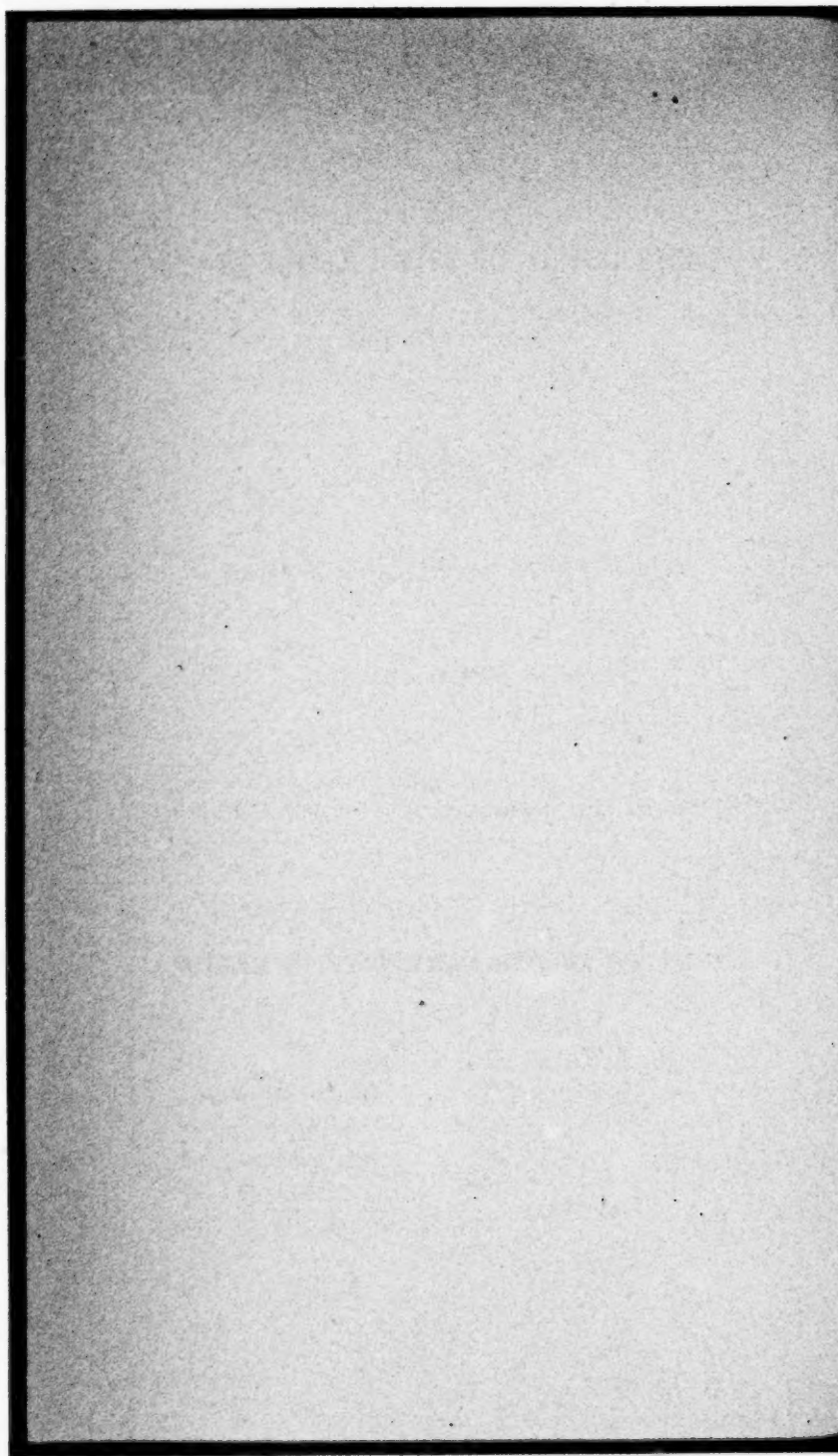
vs.

THE UNITED STATES.

**IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE
ISLANDS.**

REPLY BRIEF FOR PLAINTIFF IN ERROR.

**ALDIS B. BROWNE,
W. A. KINCAID,
ALEX. BRITTON,
EVANS BROWNE,**
Attorneys for Plaintiff in Error.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 156.

OTIS G. FREEMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE
ISLANDS.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

1. The judgment under review plainly imposes (1) imprisonment for the public offense of one year and nine months, and (2) imprisonment for seven additional months, dependent wholly upon the default in payment to the creditor of the sum of money therein named. Clearly the original term of imprisonment is absolute and represents the required expiration for the *public* offense.

2. The subsidiary imprisonment is not "in lieu" of default in payment of any fine or of the costs. It is related only to the amount of money which the judgment requires shall be restored to the creditor. It is imposed for the latter's benefit and solely to coerce such payment. Hence we submit the cases cited on the opposing brief (pp. 6-12) are not applicable.

Those cases involve imprisonment for failure to pay a *fine* or to give security against bastard children becoming a public charge, etc. The case of *People vs. Cotton*, 14 Ill., 414, 415, on the recitals of the brief, fell within the exception to the State statute forbidding imprisonment for debt. *Moore vs. Green* (73 N. C., 394, 397) in terms based the right of arrest and imprisonment upon the ground of public right. But it is plain that the case treated the offense as *single* against the State and to be satisfied by single punishment, whereas here the absolute sentence for the offense against the public is imprisonment for one year and nine months, and the added term is for the benefit of the creditors as such, and for them *alone*.

II.

The contention that the subsidiary imprisonment inflicted here is for a fine or for costs is answered from the record and the plain reading of the judgment.

The cases cited under this head on the opposing brief (pp. 15-22) relate to punishment for malfeasance in office—such as the wrongful appropriation of public moneys—(an offense directly against the State), or omission to pay taxes, or in the plain nature of a penalty or a fine to be recovered for the benefit of the State, or of a fine for contempt of court on the part of an attorney. All such cases are plainly distinguishable from the case at bar. They involve *one* penalty or fine and one punishment, while here the judgment and sentence plainly distinguish between the public

and private wrong and inflict the separate terms of imprisonment accordingly. The case of *Harris vs. Bridges* 57 Ga., 407) rests upon the State statute of replevin, which required return of the property or security for its forthcoming, and in default of both, commitment of the defendant, as the decision states, "until the personal property shall be produced, or until he shall enter into bond, with good security, for the eventual condemnation money." Manifestly, that is not "debt" in any view.

Here the punishment of imprisonment for the public offense is separately provided and in absolute form, while the subsidiary imprisonment is inflicted to compel payment of the money demand based on the judgment entered therefor. It is plain that such subsidiary punishment is a substitute for the injury caused, to wit, the failure to repay the money awarded the creditor by the judgment. It can be nothing else. The words, "or in lieu thereof" (payment) "to suffer subsidiary imprisonment," can have no other meaning. As payment would secure release, then imprisonment for the full term of seven months would be "in lieu" or discharge of the obligation incurred.

Respectfully submitted,

ALDIS B. BROWNE,
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Attorneys for Plaintiff in Error.



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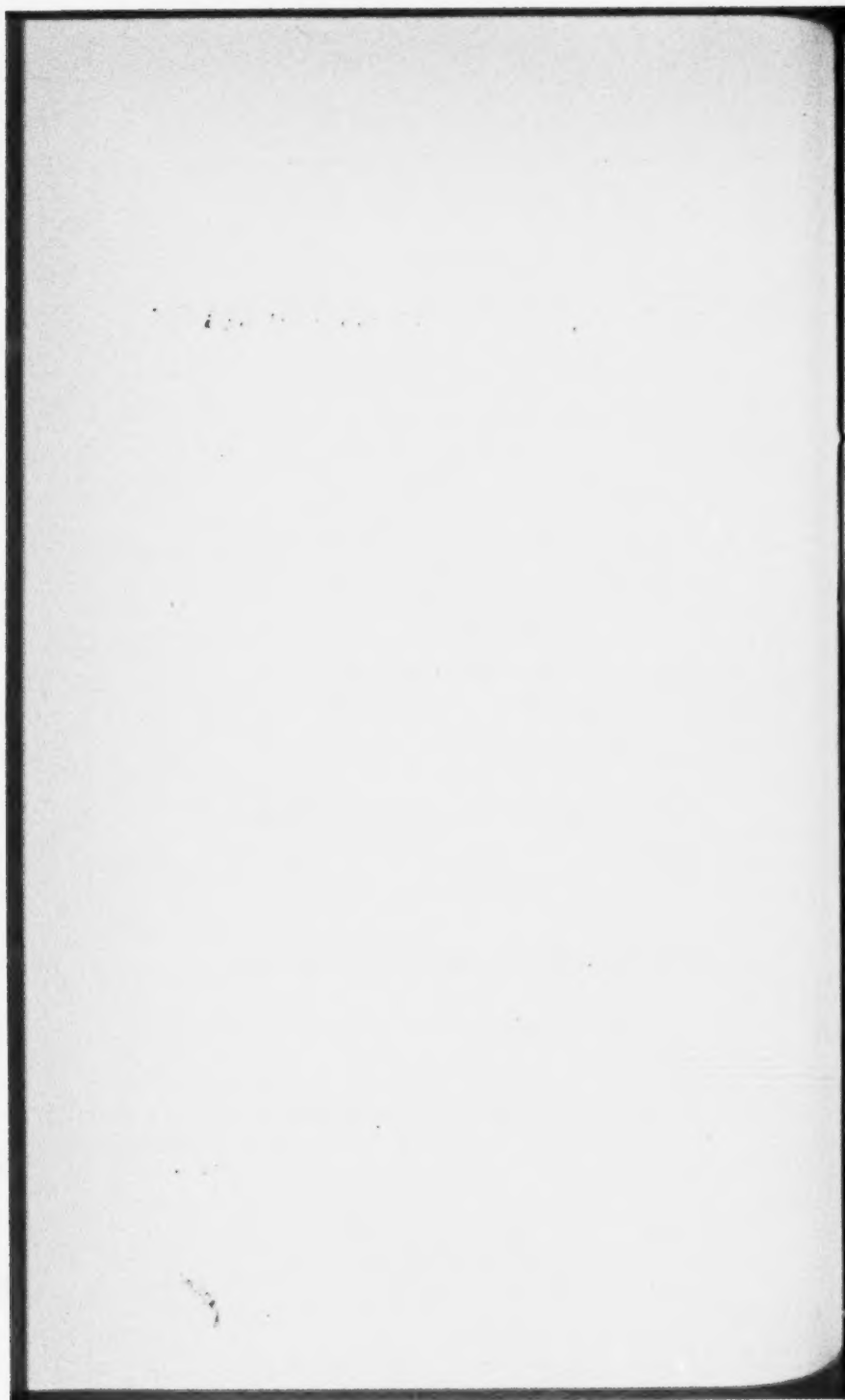
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IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE
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BRIEF FOR PLAINTIFF IN ERROR.

ALDIS B. BROWNE,
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IN THE
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IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE
ISLANDS.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

Plaintiff in error was accused, tried, and convicted in the Court of First Instance, city of Manila, of the crime of estafa, arising from alleged misappropriation of some 3,500 pesos received by him as manager of the steamship department of Castle Bros., Wolf and Sons, and for which it was charged he has failed to account (R., 1). He was arrested and arraigned upon information or complaint attested by the prosecuting witness, and tried without a jury, the sentence of the court after review of the evidence being (R., 14):

“The court therefore finds the defendant Otis G. Freeman, guilty of embezzlement of the sum of P3,500 Philippines currency, as charged in the complaint, the property of Castle Bros. Wolf and Sons, and does sentence him to imprisonment—presidio correctional, in the insular prison of Bilibid, for the period of one year and nine months, and to restore to said Castle Bros. Wolf and Sons, the sum of P3,500 Philippines currency, or in lieu thereof to suffer subsidiary imprisonment for the period of seven months and to pay the costs of prosecution.”

On appeal the Supreme Court of the Islands reviewed the evidence and found the sum alleged to have been so embezzled to be P2,078.50, adding (R., 27) :

“This finding of course, will, in no way estop the said firm of Castle Bros. Wolf and Sons from recovering in a civil action from the defendant any sum or sums in excess of this amount which are found to be due to the said firm. The only charge (change) which this finding makes in the conclusion of the lower court is in the amount of money which must be returned to the firm of Castle Bros. Wolf and Sons by virtue of this sentence.

“It is the judgment of this court that the sentence of the lower court be affirmed with this modification, and that the defendant be sentenced to be imprisoned for a period of one year and nine months of presidio correctional, and to restore to Castle Bros. Wolf and Sons the sum of P2,078.50 or in lieu thereof to suffer subsidiary imprisonment for a period not to exceed one-third of the principal penalty, and to pay the costs.”

The judgment was so entered (R., 30). Therefrom this writ of error is prosecuted.

Assignment of Errors.

A number of errors are assigned (R., 32, 33). Those which relate to the findings or rulings of the court upon questions of fact are not reviewable here, and hence the testimony is omitted by stipulation in the printing of the record in this court (R., 41). The errors assigned, reviewable here, are (R., 33):

VIII.

The court erred in refusing to dismiss this cause without prejudice to the right to institute a civil action for the rendition of accounts.

IX.

The court erred in affirming the judgment of the Court of First Instance and the sentencing of the accused to one year and nine months of presidio correctional and to repay to Castle Brothers, Wolf and Sons the sum of 2,087.50, or otherwise to suffer subsidiary imprisonment for a period not to exceed a third part of the principal penalty and to pay the costs.

XI.

The court erred and violated the constitutional law of the Philippines (the act of Congress of July 1, 1902) in sentencing the accused in this case to suffer subsidiary imprisonment, which sentence is in effect that of imprisonment for debt.

I.

The judgment and sentence was erroneous because in effect imprisonment for debt.

(Assignments IX and XI.)

The act of July 1, 1902, entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes" (ch. 1369, 31 Stats., 691), provides, in section 5, *inter alia*:

"That no person shall be imprisoned for debt."

This affirmative declaration stands in harmony with the Federal law effective upon the mainland, for, by section 990, U. S. Revised Statutes, it is provided that—

"No person shall be imprisoned for debt in any State, on process issuing from a court of the United States, where, by the laws of such State, imprisonment for debt has been or shall be abolished."

We are well aware that by the current of authority prohibition of imprisonment for debt is restricted to claims or demands arising *ex contractu*. But such decisions have been rendered in American courts of common-law tradition and practice, wherein the mixture of penal prosecution for an offense and money judgment for the creditor in one action is unknown.

Here, by the very terms of the judgment entered in both the trial court and in the Supreme Court of the Philippines, money judgment is rendered in favor of the creditor and payment required on pain of *additional* imprisonment if such payment be omitted. The money judgment is in no sense a *fine* whereof any portion goes into the public treasury. It is purely and only a recovery for the benefit of the creditor, and he may sue in another and wholly civil action

for any balance claimed by him and not embraced in the former judgment. The only theory on which such money judgment can be so entered is that of debtor and creditor—the withholding by the former of money lawfully due the latter, which is the very essence of debt under any system of laws. The demand of the creditor does not lie in tort or trespass. It is debt pure and simple, and is so treated in the judgments below and most clearly stamped with that character alone by the language of the judgment of the Supreme Court of the Philippines here under review.

It is hence, we submit, within the clear effect of the principle ruled in the leading case of *Carr vs. State* (106 Ala., 35), wherein the defendant was indicted under a State law making it a misdemeanor for a person engaged in banking to receive a deposit when insolvent, and punishing him with a fine of not less than double the amount of the deposit, one-half of which shall go to the depositor, and that payment to him before conviction shall be a defense to prosecution.

On demurrer the court ruled:

“ 1. The statute, it is insisted for the appellant, is
 “ violative of article 1, section 21, of the constitution
 “ of the State, which provides ‘that no person shall
 “ be imprisoned for debt.’ It is to be observed in
 “ the outset that this provision of the organic law
 “ is essentially different from the provisions on this
 “ subject in many other State constitutions, in that
 “ it contains no exception of ‘cases of fraud,’ and, on
 “ the same line, is essentially different from the con-
 “ stitutions of this State of 1819, 1861 and 1865,
 “ in each of which the language is that ‘the person
 “ of a debtor, where there is not strong presumption
 “ of fraud, shall not be detained in prison, after de-
 “ livering up his estate for the benefit of his cred-
 “ itors, in such manner as shall be prescribed by
 “ law.’ Const. 1819, art. 1, sec. 18; const. 1861,
 “ art. 1, sec. 18; const. 1865, art. 1, sec. 22. This
 “ change was made in the constitution of 1868 (art.
 “ 1, sec. 22), where the provision assumed its present

“form. In *Ex parte Hardy*, 68 Ala., 303, 318, it
 “was held—and we do not understand that there
 “was any division of opinion on this point—that the
 “elimination of the exception as to frauds was a
 “pregnant omission, which left the guaranty of im-
 “munity from imprisonment to the debtor to apply
 “to all cases of debt, whether they involved fraud or
 “not. So that the statute we are considering can
 “derive no aid from the idea that the receipt of a
 “deposit by a banker under the circumstances stated
 “is a fraud, and hence that, the transaction would
 “constitute ‘a case of fraud,’ since even in such cases
 “there can be no imprisonment for debt.

“2. The ‘imprisonment for debt’ which the fram-
 “ers of constitutions embodying this provision
 “doubtless had most prominently in mind was im-
 “prisonment upon process issuing in civil actions the
 “object and sole purpose of which were the collection
 “of debts. It was to remove the evils incident to the
 “system of taking the debtor’s person upon a *capias*
 “*ad satisfaciendum* that the organic inhibition came
 “primarily to be ordained. But the effect of its ordi-
 “nation has been to establish a public policy much
 “broader in its influence upon legislation and opera-
 “tion upon judicial proceedings than would have
 “sufficed for the eradication of the ills which at-
 “tended upon the recovery, or attempted recovery,
 “of debts by restraint of the debtor’s person. This
 “policy is inimical alike to the incarceration of a
 “debtor as a means of coercing payment, and to his
 “punishment by imprisonment for a failure to pay,
 “at least when such failure results from inability.
 “And hence it is that, while neither the letter of the
 “inhibition, nor the broader policy which is engen-
 “dered by it and has come to be a part of it, has
 “any application to criminal judgments for fines
 “and costs, yet it is not within legislative competency
 “to declare the mere non-performance of a contract
 “of indebtedness a misdemeanor, and punish the
 “commission thereof by imprisonment, directly or
 “indirectly; for, as said in the notes to *State vs.*
 “*Brewer* (S. C.), 37 Am. St. Rep., 753, 758, ‘as that
 “‘which is prohibited to be done directly cannot be

“accomplished by indirection, the legislature cannot
 “declare the mere non-performance of a contract to
 “be a misdemeanor, for that would amount to an
 “attempt to legalize imprisonment for debt.’ And
 “so, in Tennessee, there was a statute which made
 “it unlawful for any person, firm, corporation, etc.,
 “to refuse to cash any checks or scrip issued by them
 “if presented to them within thirty days of the date
 “of issuance, and declared that any such person, etc.,
 “so refusing to cash in lawful money such checks
 “or scrip would be guilty of a misdemeanor, and,
 “upon conviction, should be fined not less than \$10.,
 “nor more than \$25. The constitutional provision
 “in that State is that ‘the legislature shall pass no
 “law authorizing imprisonment for debt in civil
 “cases’—terms which would seem to allow greater
 “latitude of legislation in respect of cases of the class
 “we are considering than our own provision—and,
 “bringing the statute to the test of this inhibition.
 “the court said: ‘The act of the legislature in ques-
 “tion, while not directly authorizing imprisonment
 “for debt, does attempt to create a crime for the
 “non-payment of debts evidenced by checks, scrip,
 “or order, and for such crime provides a penalty,
 “which may or may not be followed by imprison-
 “ment. In that way and for that reason the act is
 “violative of the spirit if not the letter of the con-
 “stitutional provision above cited. It is in direct
 “imposition of imprisonment for the non-payment
 “of debt, and is therefore clearly within the consti-
 “tutional inhibition.’ *State vs. Paint Rock Coal &*
 “*C. Co.*, 92 Tenn., 81. And this principle of apply-
 “ing the policy of the organic law on this subject
 “to cases which may not be strictly within its letter
 “has received recent recognition by this court. *Ex*
 “*parte Russellville*, 95 Ala., 19.

“The statute involved in the case at bar is a much
 “more flagrant attempt to authorize imprisonment
 “for debt, in our opinion, than that denounced by
 “the Supreme Court of Tennessee. It was not the
 “avowed purpose of that act to enforce the payment
 “of a debt by means of a prosecution under it. This
 “one cannot be read without conviction that its pur-

“pose is to impose imprisonment for debt and
 “to coerce the payment of the debt by the
 “duress it authorizes. Its requirement that the fine
 “shall be paid only in money, that it shall be double
 “the amount of the deposit, and that one-half of
 “it—that is, a sum equal to the amount deposited—
 “shall go to the person who made the deposit, tends,
 “at least, to show that coercion of payment of the
 “debt which the depositary owed the depositor—for
 “the transaction created the relation of debtor and
 “creditor between them—by means of the restraint
 “which the imposition of the fine itself immediately
 “put upon the defendant, not to speak here of his
 “imprisonment preliminary to the trial, and, that
 “failing to enforce payment, by means of imprison-
 “ment at hard labor for the payment of the fine and
 “costs, was the moving purpose and efficient cause
 “of the enactment of the statute. And what doubts
 “on this point might have been left, had the statute
 “stopped here, are removed beyond peradventure by
 “its further provision that payment to the depositor
 “at any time before conviction ‘shall be a good and
 “lawful defense to any prosecution under this act.’
 “There cannot be two opinions as to the intent and
 “meaning, or the effect upon the whole enactment,
 “of this last and most remarkable provision. It is
 “a declaration of the baldest and most direct char-
 “acter to one party to a transaction, whereby he has
 “incurred a debt to the other, in the name of the
 “State, that, unless he pays that debt, he shall be
 “arrested, held to trial, tried, convicted, fined, and
 “imprisoned at hard labor, and this obviously not for
 “any taint of criminality in the transaction out of
 “which the debt arose, but purely and simply for
 “the non-payment of the debt. For this default,
 “and until it is purged either by simply paying the
 “debt and accrued costs before conviction or by work-
 “ing out double the debt and the costs, the debtor
 “may be imprisoned for an indefinite time before
 “trial, merely and only because he does not pay the
 “debt and the expenses of putting this coercion upon
 “him, there being no pretense even of ultimately
 “punishing him for taking the deposit, if the pre-

"liminary imprisonment shall have the desired effect
 "of extorting the money he owes the depositor out
 "of him; and if, as is the case here, the compulsion
 "of preliminary imprisonment fails of its intended
 "effect, he may, under the guise of punishing an
 "act which was not criminal before this statute, and
 "which upon the statutory definition does not neces-
 "sarily involve abstract criminality or the taint of
 "moral turpitude, and which might up to the very
 "moment of conviction have been shorn of even its
 "factitious criminality by the payment of a debt,
 "be held to hard labor until his services at the statu-
 "tory rate shall yield the amount of the debt, and
 "for an equally long time to work out a like sum
 "imposed upon him as an additional penalty for his
 "failure to pay the debt before conviction. There
 "can, in our opinion, be no sort of doubt that this
 "enactment is violative of the constitutional pro-
 "vision, and therefore void. The trial court erred
 "in overruling the demurrers which went to this
 "point, and the motion in arrest of judgment based
 "upon them. Its judgment will be reversed, and a
 "judgment will be here entered discharging the de-
 "fendant."

That the money judgment thus rendered in this case for
 the benefit of the creditor is in no sense a *fine* is demon-
 strated by the provision of article 49 of the Philippine Penal
 Code, which reads thus:

- "ART. 49. In case the property of the person pun-
 "ished should not be sufficient to cover all the pecu-
 "niary liabilities, they shall be satisfied in the follow-
 "ing order:
- "1. Reparation of the injury caused and indemni-
 "fication of damages.
 - "2. Indemnification to the State for the amount
 "of stamped paper and other expenses which may
 "have been incurred on his account in the cause.
 - "3. The costs of the private accuser.
 - "4. Other costs of procedure, including those of
 "the defense of the person prosecuted, without prefer-
 "ence among the persons interested.

" 5. The fine.

" Should the crime have been of those which can
" be prosecuted only at the instance of a party, the
" costs of the private accuser shall be satisfied in
" preference to the indemnification to the State."

In *U. S. vs. Hutchins*, 5 Phil., 343, it was held (syllabus) :

" A subsidiary imprisonment for non-payment of
" a fine imposed under Acts Nos. 610 and 652 of the
" Philippine Commission cannot be inflicted."

The same rule was reaffirmed in

U. S. vs. Linesses, 5 Phil., 631.

U. S. vs. Glefonce, 5 Phil., 570.

U. S. vs. Cortes, 7 Phil., 149.

In *U. S. vs. Macasaet*, 11 Phil., 447, 449, it was held that Act No. 732 of the Philippine Commission, effective November 1, 1907, does include subsidiary imprisonment for violation of acts of the Commission "*until the fine is paid.*" Hence it is plain that the Philippine Commission distinguishes, as we here contend, by imposing such subsidiary imprisonment only where a *fine* is involved. It hence results that, even in the Philippine Islands, subsidiary imprisonment for debt is, in effect, sought to be enforced under the provisions of the Philippine Penal Code, while the legislative acts of the Philippine Commission recognize the prohibition against imprisonment for debt, as forbidden by the organic act of 1902, *supra*.

In many of the States, by constitution or statute, the prohibition against imprisonment for debt is limited by the words "except in cases of fraud," or other equivalent expression. But in the Philippine Act, *supra*, this exception is not found. And while, of course, it is well settled that fines, as such, are not within the prohibition against imprisonment for debt, it is plain that a judgment in favor of the creditor, for money due from the debtor, and hence

wrongfully withheld, is, in fact and law, a judgment for debt. The test is made absolute by the action of the Supreme Court of the Philippines in expressly declaring that the judgment now entered against the plaintiff in error, in favor of the creditor, "would in no way estop the said firm of Castle Bros., Wolf & Son, from recovering in a civil action from the defendant, any sum or sums in excess of this amount, *which are found to be due to the said firm*" (R., 27). Certainly, under any such further action, and resulting judgment thereon, imprisonment for non-payment could not be imposed. As certainly the obligation from the plaintiff in error to these creditors to return any money due them is not divisible, whereby the judgment here entered may be enforced by imprisonment, and the further judgment hereafter entered in another action cannot be.

II.

"The court erred in refusing to dismiss this cause without prejudice to the right to institute a civil action for the rendition of accounts."

(Assignment VIII.)

The contradictory decisions below amply sustain this contention. In the trial court, upon review of the evidence, judgment was rendered against plaintiff in error and in favor of complainants for P3,500, and "subsidiary imprisonment" for seven months inflicted for its non-payment (R., 14). In the Supreme Court of the Islands, and upon the same evidence, the judgment was reduced to P2078.50, and on failure to pay same to the creditor the plaintiff in error was condemned "to suffer subsidiary imprisonment for a period not to exceed one-third of the principal penalty" (R., 27).

"In lieu thereof," means "instead of" (Century Dictionary, *Lieu*), or in satisfaction or place of. Yet the same court by

its decision *supra* declares that neither such payment in money or by "subsidiary imprisonment" would bar the creditor from a civil action to recover any sum he may therein prove to be due in *excess* of the judgment rendered in this action and upon the *same* demand. In other words, imprisonment will satisfy (and therefore discharge) the judgment here rendered, leaving another and wholly civil action open to the complainants to recover any *additional* sum arising out of the same cause of action. The novelty of this result is certainly surprising to practitioners in courts of common-law tradition. It forcibly illustrates the result of combining the civil law expressed in code form and procedure with American law, procedure and judgments. With all respect it is submitted that the attempt to thus adjust fundamental differences is simply to invade the orbit of the former by the wholly variant system of the latter, with resulting collision and discord. In the American system punishment is by the State and for the public benefit alone, to sustain the offended dignity of the State, arising from the infraction of its penal laws, while in the Philippines, under a common sovereignty and flag, the procedure here involved plainly *reverses* that fundamental principle and affords substantive relief to the complainant by rendering money judgment in his favor and "in lieu" of payment imposes *additional* imprisonment in satisfaction of the complainant's money demand, but without prejudice to his right to sue in a purely civil action to recover more, although arising out of the same transaction. Under such conditions *here* former recovery is a plea in bar, while *there* a partial accounting may be had in a mixed penal and civil action, but without prejudice to a further demand in a civil suit.

It would seem perfectly plain, therefore, that in any court sitting under the American flag the distinction between civil and criminal actions must be recognized and maintained. In the case at bar the alleged offense against public justice, *per se* is one thing, and the civil demand of private parties

another and wholly independent thing. Embezzlement is an offense against the State, and its punishment is in vindication of the dignity and laws of the State. Debt *inter partes* is a wholly different thing, for which the law affords abundant remedy in a civil action. It is not correct to say that restitution to the injured party may, under the American system, be made part of the judgment and sentence imposed as punishment for a public offense. Restitution is also the basis and purpose of all civil remedies.

When, then, money judgment is sought by the injured party, and the proceeding abides *his* initiative, it is plain his full remedy lies in a civil action for its enforcement. Otherwise the penal laws would stand solely for enforcement at the pleasure of the private litigants. But we submit as fundamental that nowhere within the territorial sovereignty of the United States should it be rightfully maintained that enforcement or non-enforcement of the penal law rests only in the choice of the creditor. The individual subject to prosecution and punishment for such violation, is an offender against *public* law. The offense and resulting punishment is in the hands of the State alone and subject only to its control. To hold otherwise, is to wholly exclude the State and make paramount and exclusive the privilege and demand of the creditor. In effect it substitutes private interest and private motive for the superior and exclusive interest of the State. Such result is, we submit, in fundamental conflict with those principles of American Government which should control everywhere under the flag. It is impossible to recognize any statute existing anywhere which stands in such flat contradiction to this vital principle of American jurisprudence. The conflict is too plain to require extended comment. Hence we submit the procedure here invoked, and the remedy sought to be applied thereunder in favor of the creditor, demonstrates the contention here made that the court below erred in refusing to dismiss this cause without prejudice to the right of the creditor to in-

stitute a civil action for the rendition of accounts. The plaintiff in error is a citizen of the United States. Surely he is entitled to the equal protection of the laws wherever his alleged offense may have been committed within the territorial jurisdiction of the National Government. That is not a constitutional guaranty alone. It needs no written declaration for its existence. It exists in civilized government everywhere. It is extended in express words to the Philippines by the organic act of 1902, section 5 (31 Stats., p. 692).

We submit the judgment should be reversed.

ALDIS B. BROWNE,
W. A. KINCAID,
ALEX. BRITTON,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

OTIS G. FREEMAN, PLAINTIFF IN ERROR, }
v. } No. 156.
THE UNITED STATES.

*IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE
ISLANDS.*

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Plaintiff in error was charged with embezzling, while an employee of Castle Brothers, Wolf & Sons, ₱3,500 the property of said company (Rec., 1). On the trial the Court of First Instance found him guilty, and pronounced the following judgment:

The court therefore finds the defendant, Otis G. Freeman, guilty of embezzlement of the sum of ₱3,500 Philippine currency, as charged in the complaint, the property of Castle Brothers, Wolf & Sons, and does sentence him to imprisonment—*presidio correccional*—in the insular prison of Bilibid for the period of one year and nine months, and to

restore to said Castle Brothers, Wolf & Sons the sum of ₱3,500 Philippine currency, or in lieu thereof to suffer subsidiary imprisonment for the period of seven months, and to pay the costs of prosecution. (Rec., 14.)

On appeal, the Supreme Court of the Philippine Islands, after reviewing the evidence, summed up its finding of facts and pronounced judgment in the following language:

We are of the opinion, and so hold, that the evidence shows, beyond peradventure of doubt, that the defendant did receive the sum of ₱2,078.50, while acting as employee of the firm of Castle Brothers, Wolf & Sons, with the obligation to return the same to said firm. This finding, of course, will in no way estop the said firm of Castle Brothers, Wolf & Sons from recovering in a civil action from the defendant any sum or sums in excess of this amount which are found to be due to the said firm. The only change which this finding makes in the conclusion of the lower court is in the amount of money which must be returned to the firm of Castle Brothers, Wolf & Sons by virtue of this sentence.

It is the judgment of this court that the sentence of the lower court be affirmed with this modification, and that the defendant be sentenced to be imprisoned for a period of one year and nine months of *presidio correccional*, and to restore to Castle Brothers, Wolf & Sons the sum of ₱2,078.50, or in lieu thereof to suffer subsidiary imprisonment for a period not to exceed one-third of the principal penalty, and to pay the costs. (Rec. 27.)

The sixth clause of section 5 of the act of July 1, 1902, known as the Philippine bill of rights (ch. 1369, 32 Stat., 692), provides that no person "shall be imprisoned for debt." The following are the laws of the Philippine Islands under which plaintiff in error was prosecuted and the sentence was imposed:

(1) Philippine Penal Code, article 535:

The following shall incur the penalties of the preceding articles:

* * * * *

5. Those who, to the prejudice of another, shall appropriate or misapply any money, goods, or any kind of personal property which they may have received as a deposit on commission for administration or in any other character producing the obligation to deliver or return the same, or who shall deny having received it.

(2) Philippine Penal Code, article 534:

A person who shall defraud another in the substance, quantity, or quality of things he may deliver to him, by virtue of an obligation, shall be punished—

* * * * *

2. With that (the penalty) of *arresto mayor* in its medium degree to *presidio correccional* in its minimum degree if it should exceed 250 pesetas and not be more than 6,250 pesetas.

(3) Philippine Penal Code, article 28:

* * * * *

Those [penalties] of *presidio correccional* and *prision correccional* shall last from six months and one day to six years.

* * * * *

That of *arresto mayor* shall last from one month and one day to six months.

(4) Philippine Penal Code, article 49:

In case the property of the person punished should not be sufficient to cover all the pecuniary liabilities, they shall be satisfied in the following order:

1. Reparation of the injury caused and indemnification of damages.

2. Indemnification to the state for the amount of stamped paper and other expenses which may have been incurred on his account in the cause.

3. The costs of the private accuser.

4. Other costs of procedure, including those of the defense of the person prosecuted, without preference among the persons interested.

5. The fine.

Should the crime have been of those which can be prosecuted only at the instance of a party, the costs of the private accuser shall be satisfied in preference to the indemnification to the state.

(5) Philippine Penal Code, article 50:

If the person sentenced should not have property to satisfy the pecuniary liabilities included in Nos. 1, 3, and 5 of the preceding article, he shall be subject to a subsidiary personal liability at the rate of one day for every 12½ pesetas, according to the following rule:

1. If the principal penalty imposed is to be undergone by the criminal confined in a penal institution, he shall continue therein, although said detention can not exceed one-

third of the term of the sentence, and in no case can it exceed one year.

* * * * *

(6) Philippine Penal Code, article 52:

The personal liability which the criminal may have incurred by reason of insolvency shall not exempt him from the reparation of the injury caused and indemnification of damages if his pecuniary circumstances should improve; but it *shall* exempt him from the other pecuniary liabilities included in Nos. 3 and 5 of article 49.

Counsel for plaintiff in error insist (1) that the judgment and sentence that plaintiff in error suffer subsidiary imprisonment was erroneous, because in effect it is an imprisonment for debt; and (2) that the cause should have been dismissed without prejudice to the right to institute a civil action for the rendition of accounts.

These contentions will be considered in the order mentioned.

ARGUMENT.

I.

The sentence of subsidiary imprisonment for a period not to exceed one-third the principal penalty of one year and nine months presidio correccional, in lieu of the restoration to Castle Bros., Wolf & Sons, the sum of P2,078.50, is not in conflict with that provision in the Philippine bill of rights which prohibits imprisonment for debt.

The conflict between the judgment pronounced by the court and the Bill of Rights, contended for by

plaintiff in error, does not exist for the following reasons:

First. *The prohibition is against imprisonment for debt due by contract, and not for a liability arising out of the embezzlement of money.*

This view is supported by the following authorities, in which the reasons for such an interpretation of similar provisions are given:

In the matter of petition of Wheeler (34 Kans., 96) the petitioner had been imprisoned under a bastardy act which directed how the judgment of the court for the support of the child should be enforced, and, among other things, provided that the judgment should specify the terms of payment and should require the defendant, if he were in custody, to secure the payment of the judgment by good and sufficient sureties, or in default thereof, be committed to jail until such security should be given. In determining whether said act was in violation of the constitutional provision that no person "shall be imprisoned for debt, except in cases of fraud," the court said:

It is urged on behalf of the petitioner that this and other sections of the act that provide for commitment to the county jail come within the prohibition of the constitution above quoted. We think not. There are many forms of liability that do not constitute a debt in the technical and legal sense of that term. Imprisonment for debt as here used has a well-defined meaning, and as has been repeatedly decided, applies only to liabilities arising upon contracts. (*McCool v. The State*,

23 Ind., 129; *Ex rel. Brennan v. Cotton*, 14 Ill., 414; *Lower v. Wallick*, 25 Ind., 68; *Dixon v. State*, 2 Tex., 481; *Musser v. Stewart*, 21 Ohio St., 353; *Hawes v. Cooksey*, 13 Ohio, 242; *Moore v. Green*, 73 N. C., 394; *Ex parte Cottrell*, 13 Nebr., 193.)

The charge of maintenance and education, while it is in the nature of a civil obligation and imposed in a proceeding which is essentially civil, though criminal in form, is not based upon contract either express or implied. It is the duty of the father to make provision for the support of his illegitimate offspring. To compel him to assist in the maintenance of the fruit of his immoral act, and to indemnify the public against the burden of supporting the child, is the purpose of the proceeding in bastardy.

In *Musser v. Stewart* (21 Ohio St., 353) it was held that a statute which authorized the imprisonment of a defendant for nonpayment of a judgment in a bastardy case was not in contravention of a clause in the Constitution which provided that "No person shall be imprisoned for debt in a civil action * * * unless in cases of fraud." The court, among other things, said:

This is not a suit to recover a sum of money owing from the defendant to the complaining party. The liability sought to be enforced is not founded upon contract express or implied, but originates in the wrongful act of the defendant against the consequences of which the statute is designed to protect the public.

It was not determined whether the action was civil or criminal, but the decision was apparently made to rest upon the fact that the liability was not a debt within the meaning of the Constitution, and, further, because the statute was in the nature of a police regulation.

In *People v. Cotton* (14 Ill., 414, 415) a judgment had been rendered against the petitioner, Brennan, for trespass upon personal property, for which an execution was issued and returned "no property found." The plaintiff then made oath that the relator was able to pay the judgment, but fraudulently withheld the money; and thereupon the justice issued a capias upon which the relator was arrested and committed to the common jail until he should satisfy the judgment and costs. The constitution contained the provision that "No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud." The Supreme Court held that—

This prohibition applies only to actions upon contracts, express or implied. It does not extend to actions for torts. The design is to relieve debtors from imprisonment who are unable to perform their engagements.

In *Moore v. Green* (73 N. C., 394, 397) it appeared that under a statute existing in that State the defendant was sued in a civil action for libel, and was at the same time taken into custody under a warrant of

arrest. The constitution contained a clause providing that "there shall be no imprisonment for debt in this State, except in cases of fraud," and it was insisted that the proceedings were in violation of this provision. The court overruled this contention, holding that such liability was not a debt within the meaning of that term in the constitution; and, among other things, said:

Undoubtedly, for some purpose, it is (a debt). An action of debt may be maintained on it (the claim for damages), and a *fi. fa.* may issue on it. But to construe the above-cited clause of the bill of rights as forbidding imprisonment for any cause of action which by judgment would become a debt, would make its prohibition extend to all cases, as every cause of action becomes a debt in one sense when a judgment is recovered on it. Chitty, in his standard book on Pleading, divides all actions into two great classes; those which arise *ex contractu*, and those which arise *ex delicto*. No doubt the framers of the constitution had this familiar classification in mind, and in forbidding imprisonment for debt, they referred rather to the cause of action as being *ex contractu*, than to the form it would assume upon a judgment. If they had meant to forbid imprisonment in every civil action, they would have said so. But by forbidding it for *debt*, they plainly imply that it may be allowed in actions which are not for debt. In forbidding imprisonment for debt, as popularly understood, viz, for

a cause of action arising *ex contractu*, they responded to the general public sentiment, but I know of no writer on the reform of law who has recommended the abolition of punishment for trespassers and wrongdoers. Such a provision might be humane to the injuring, but it would not be so to the injured, parties. It would withdraw from the State its power to impose a wholesome check on violence and wrong, and would tend to license disorders and lawbreakings incompatible with the peace and welfare of society.

In *McCool v. The State* (23 Ind., 127, 131) the plaintiff had been prosecuted for retailing intoxicating liquors without a license, and upon conviction it had been adjudged that he pay a fine of \$5 and costs and stand committed to jail until the fine and costs were paid.

It was insisted that the costs were a matter of debt within the meaning of the clause of the constitution which provided that "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted; and there shall be no imprisonment for debt, except in case of fraud."

The court remarked that it was not aware that it had ever been claimed that the first clause of this section extended to liabilities other than those growing out of contracts, either express or implied, citing a statute which showed that the legislature had, in

effect, placed that interpretation upon the clause, and then the court proceeded:

The second clause of the section prohibiting imprisonment for debt, except in case of fraud, connected as it is with the first clause by the copulative conjunction, would seem to relate to the same subject or class of liabilities, and if so, the immunity contemplated by the second clause would be confined to debts or liabilities growing out of contracts, and not to liabilities resulting from crimes or torts.

The court further held that:

The costs were but an incident of the fine assessed, resulting from the same act, and that although they are due to the officers of the court and witnesses for services rendered in the course of the prosecution, they are adjudged against the defendant because of his criminal act, and may be fairly regarded as a part of the punishment.

The phrase "any debt or liability" in the first clause would certainly admit of a broader interpretation than the word "debt" in the second clause, and if the first had been uniformly restricted to liability created by contract, it followed as a matter of course that the latter should be so restricted.

In *Charleston v. Oliver* (16 S. Car., 47, 51, 52) it was insisted that an ordinance of the city of Charleston that provided that the city court might give judgment for the amount of a license tax and penalty, or imprisonment for thirty days, in case of nonpayment, was in violation of a clause of the state constitution

which provided that "No person shall be imprisoned for debt, except in cases of fraud." The court overruled this contention, holding that the word "debt," as used in the constitution, had to be taken in its ordinary sense, and that it did not embrace taxes levied for the support of the government or any of its agencies.

Second. *The imprisonment in lieu of the payment of ₱2,078.50 to Castle Brothers, Wolf & Sons, is imposed for the criminal offense of converting their property to plaintiff in error's own use, and is not, therefore, an imprisonment for debt.*

The validity of the laws of the Philippine Islands which authorize the imposition of subsidiary imprisonment when the offender fails to restore the funds converted is not here in question, except in so far as they authorize this particular judgment. It is the judgment and not the law that is here challenged. It is conceded that the judgment falls within the scope of the laws in force in the Philippine Islands when ceded to the United States; but if there were any ground to question such fact, it would be a matter exclusively for the Philippine courts. But those laws may be looked to to determine the character of this judgment, and the real basis upon which it rests.

By article 50 of the penal code, which is above quoted in the statement of facts, it is provided that, if the person sentenced should not have property sufficient to satisfy the pecuniary liabilities included

in Nos. 1, 2, and 3 of article 49, he shall be subject to subsidiary personal liability of one day for every 12½ pesetas; and if the principal penalty is to be undergone by the criminal in a penal institution, he shall continue therein, the detention not to exceed one-third of the principal term, and in no case to exceed one year. The liabilities mentioned in Nos. 1, 3, and 5 of article 49 are (1) reparation of the injury caused and indemnification of damages; (3) the costs of the private accuser, and (5) the fine.

By article 52 it is provided that the personal liability which is incurred by reason of insolvency shall not exempt the criminal from the reparation of the injury caused and indemnification of damages if his pecuniary circumstances shall improve, but it shall exempt him from the payment of the costs of the private accuser and the fine.

As will appear from the authorities hereinafter cited, the costs of a criminal prosecution and the fine imposed therein are not debts within the meaning of the inhibitions of imprisonment for debt, which are found in all or many of the state constitutions; and, therefore, imprisonment which is inflicted as a substitute for the payment of fine and costs is not unlawful. It was in accordance with article 52 that the court, in its judgment, incidentally remarked that—

this finding (that Freeman had converted P2,078.50 instead of P3,500 as found by the Court of First Instance) of course will in no way estop the said firm of Castle Brothers, Wolf & Sons from recovering in a civil action

from the defendant any sum or sums in excess of this amount which are found to be due to the said firm.

That is, it was recognized that the finding of the amount in this case was in no sense an adjudication which could be binding in a civil action, but that such finding *was only for the purpose of fixing the punishment for the crime committed.*

The imprisonment, therefore, is not a substitute for the reparation for injury caused. The liability of the criminal for the payment of the funds converted is not extinguished, or in the least affected, and while it is recited in the judgment that the additional imprisonment shall be in lieu of a restoration of the ₱2,078.50 converted, yet the judgment must be read in the light of the Philippine laws, and the phrase "in lieu of" can not mean "in satisfaction or place of," as contended for by counsel for plaintiff in error.

While, then, one object of judgments for subsidiary imprisonment rendered under the statutes quoted is to secure the return of the money converted, and while the imprisonment may be avoided by its repayment, *yet the debt itself does not form the basis of the judgment, but the sentence in fact rests upon the crime committed in the conversion. In the absence of the unlawful and felonious conversion, no sentence, either principal or subsidiary, could be pronounced; and the subsidiary sentence finds its root in the crime just as much as does the principal sentence.*

The abolishment of imprisonment for debt was never intended to apply to a judgment which inci-

dentally requires the return of stolen or embezzled property, even though a measure of relief is given to the criminal in case the property is returned or paid for. The liability contemplated was one of a civil character alone, and not one growing out of a *criminal* act. For the *crime*, any punishment which is not cruel or unusual may be inflicted by the courts when authorized to do so by proper legislation; and if, as a part of the punishment, the criminal be required to return money stolen or embezzled, or to make reparation for an injury caused by the crime, or to suffer additional imprisonment in case the money is not returned or reparation made, either of the alternative punishments is suffered in consequence of, and for, the *criminal offense*, and the imprisonment, if it be the punishment actually inflicted, is not for debt.

This view is fully sustained by the following authorities:

In *Smith v. McLendon* (59 Georgia, 523, 527) a rule *nisi* was granted against an attorney at the instance of a client, calling upon him to show cause why he should not pay over certain money which he had collected for the client, or why the rule should not be made absolute and he be attached for contempt of court. He denied that he had collected the money, but a verdict was rendered holding him liable, which on appeal was affirmed by the Supreme Court. An attempt was made to collect the money by process of law, which failed, and the attorney was subsequently arrested on attachment by the sheriff and lodged in jail. The contention that he was

being imprisoned for debt was not sustained, the court saying:

Imprisonment under an indictment for contempt to compel obedience by an officer of court to a lawful order to pay over money which he has collected in the course of his official or professional duty, is not imprisonment for debt. It is sound disciplinary dealing with an unruly member of the forensic household. One who lives and moves within the precincts of the court misbehaves, to the injury of a person who has trusted him, and whose confidence he has abused, and the court orders him to make redress. He refuses, and the court, as the minister of the law, chastens him by imprisonment, and endeavors to coerce obedience. It is true he is a debtor; but he is more than a debtor—he is an assistant in the affairs of justice, and as such bears a peculiar and special relation to the law. Through that relation the court acts upon him, treating him, not as a mere debtor who will not pay, but as a domestic of the law who refuses to obey his master.

In *Jeffries v. Laurie* (27 Fed., 198), decided by Mr. Justice Brewer, it was held that an imprisonment for contempt in failing to obey an order to pay over money collected for a client, was not imprisonment for debt within the meaning of the constitution of Missouri, his honor saying:

The punishment is not technically and simply for a disobedience of an order, standing by itself, for the payment of money. The

matter lies deeper than that. This proceeding is based upon the fact that counsel has collected money and failed to pay it over to his client, *and the order which was made for payment is simply an adjudication of the existence of the prior wrong.* If it had been shown that counsel collected money, had been robbed of it, or had lost it by means beyond his control, of course no peremptory order for payment would have been made. The fact that the order was passed is upon the idea that there had been prior misconduct in not paying over; *so this is not to be treated as an attempt to collect a debt by imprisonment, but as a summary proceeding resting wholly upon the fact of the professional misconduct of the attorney in collecting money belonging to his client and appropriating it to his own use.* The order was simply one step in the proceeding.

These cases, it is submitted, are in principle on all fours with the present case. In a contempt case the offender may secure relief from the imprisonment by a payment of his liability to his client; but if he fails to do so, he is imprisoned, *not for the debt, but because of his offense against the court.* So, in the case at bar, plaintiff in error may be relieved from the subsidiary imprisonment by paying \$2,078.50 to Castle Brothers, Wolf & Sons; but if he fails to do so, he will be imprisoned, not for that indebtedness, but for the crime committed against the public in embezzling that sum.

In *State of Maryland v. Nicholson* (67 Md., 1) the validity of a statute was attacked on the ground that

the act "is in conflict with the constitution of this State, which abolishes imprisonment for debt." The language of the act was as follows:

That if any collector shall willfully detain in his possession taxes collected by him and neglect to pay the same into the treasury of the State for more than sixty days after the day upon which it is made his duty to pay the same, or if no particular day be appointed, shall neglect to pay the same for the space of six months, he shall be deemed to be a defaulter, and upon conviction shall be imprisoned in the penitentiary, * * * unless the amount for which he is a defaulter be sooner paid.

In passing upon this question, the court said:

There is a broad distinction, however, between imprisonment for debt within the meaning of the constitution and *imprisonment for a breach of duty on the part of a public officer, although such breach of duty may be the neglect or refusal on his part to pay money received by him for the use of the State*. Public officers were by the common law indictable for *malfeasance* or *misfeasance* in office, and although the constitution abolishes imprisonment for debt, this in no manner interferes with the power of the legislature to punish such offenses by imprisonment or otherwise, as the public interests may require.

A collector of taxes is a *public officer*, whose duty it is to collect the taxes and pay the same into the treasury of the State, or to the parties entitled, and if he neglects to discharge this

duty and appropriates to his own use the money thus received by him as collector, the legislature has the power to declare such acts of *commission or omission* to be an offense punishable in such manner as it may deem proper. Any other construction would deprive the legislature of all power to punish defaulting officials for the appropriation by them of money received and held in trust for the State. *Nor is it any objection to the statute that it provides, upon the payment of the money for which he is in default either before or after conviction, such collector shall be discharged, for the reason that the legislature has the right to prescribe the terms and conditions upon which the punishment shall be imposed.*

In *Harris v. Bridges* (57 Ga., 407) *habeas corpus* case, the petitioner Harris had been arrested in an action of trover for the recovery of personal property, sued out under the provisions of certain sections of the code. On the hearing he offered to prove his inability to produce the articles of personal property for which the action of trover was brought. This the court below refused to permit him to do and remanded him to jail. It was insisted in the Supreme Court of Georgia that the act in question and proceedings under it in which the petition was heard were in violation of the clause of the Constitution which provided that "there shall be no imprisonment for debt." In affirming the judgment of the court below, the Supreme Court said:

The bail required in actions of trover for the recovery of personal property under the

provisions of that statute, and the proceedings authorized by it, can not, in any legal sense, be considered as an imprisonment for debt. If one man obtains the possession of the personal property of another by fraud or violence, or, having possession of it, and there is reason to apprehend that it will be eloiigned or moved away or will not be forthcoming to answer the judgment that may be made in the case, there would seem to be no good reason why he should not be proceeded against and be required to comply with the terms of the statute made and provided for such cases; and if the defendant should be imprisoned, in accordance with the terms of the statute, on his failure to comply therewith he can not be said to have been imprisoned for *debt*. The theory of the statute is to prevent the taking possession of personal property by fraud or violence, and thereby prevent the true owner thereof from recovering it, and also to prevent a breach of the peace in attempting to do so, by requiring the defendant to enter into a recognizance, with security, for the forthcoming of the property to answer the judgment in the case, and if the defendant fails to give such security, then it is made the duty of the sheriff, or other lawful officer, to seize the property and deliver it over to the plaintiff, upon his entering into like recognizance, with security; and if the property is not to be found and can not be seized by the sheriff, or other lawful officer, the defendant shall be committed to jail, to be kept in safe and close custody, until the

said personal property shall be produced, or until he shall enter into bond, with good security, for the eventual condemnation money.

In *State v. Wallin* (89 N. C., 570, 580) the court held that the costs which accrued on behalf of the State in a criminal prosecution and adjudged against the defendant, did not constitute a debt in the sense of that term as used in the Constitution which prohibited imprisonment for debt, but were in the nature of a penal infliction, punitive in character and purpose, as was the fine.

In *re Ebenhack, petitioner* (17 Kans., 618, 622), it was held, Mr. Justice Brewer delivering the opinion of the court, that under that clause of the Constitution which prohibited imprisonment "for debt, except in cases of fraud," the legislature had the power to provide that when, upon the trial of a misdemeanor, the jury should find the defendant not guilty, and also find that the prosecution was instituted from malice and without probable cause, the justice might adjudge the costs against the prosecuting witness, and if he failed to pay or give security for its payment, might commit him to the county jail until they were paid, the court saying:

These costs are cast upon him as a penalty; they do not constitute strictly and simply a debt, in the technical sense of the word, any more than the fine imposed upon a party convicted of assault and battery, is a debt.

In the matter of *Albert Beall* (26 Ohio St., 195) it was held that the provision of an act authorizing the

arrest on execution of a party against whom a fine had been adjudged, and his imprisonment until such fine should be paid or he be otherwise discharged according to law, was not unconstitutional, and that the provision applied to all cases where the party was adjudged to pay a fine, and was not confined to cases where the party was adjudged to stand imprisoned until the fine and costs were paid.

In accordance with the same principle are sections 6574 and 6575 of Shannon's Code of Tennessee, by the first of which it is provided that—

If any person charged with the collection, safe-keeping, transfer, or disbursement of money or property belonging to the State or any county, use any part of said money or property by loan, investment, or otherwise, without authority of law, or convert any part thereof to his own use in any way whatever, he is guilty of embezzlement, and for every such act, upon conviction, shall be imprisoned in the penitentiary not less than five nor exceeding twenty years, and fined in a sum equal to the money embezzled, to be applied in satisfaction thereof.

And by the latter section it is provided:

If such officer or person shall account for and pay over, according to law, all money, property, or other effects by him collected or received, he shall not be within the provisions of the preceding section.

Article 1, section 18, of the constitution of Tennessee, provides that—

The legislature shall pass no law authorizing imprisonment for debt in civil cases—

but apparently the constitutionality of this law has never been questioned.

The case of *Carr v. State* (106 Ala., 35), which is especially relied upon by plaintiff in error, is not in conflict with the authorities above cited. The statute there under consideration made it a misdemeanor for a person engaged in banking to receive a deposit when the bank was insolvent, and provided that in case of conviction such person should be fined not less than double the amount of the deposit, one-half of which should go to the depositor, and that payment to him before conviction should be a defense to prosecution. In considering the policy and effect of the prohibition of imprisonment for debt, contained in the Constitution, the court said:

It was to remove the evils incident to the system of taking the debtor's person upon a *capias ad satisfaciendum* that the organic inhibition came primarily to be ordained. But the effect of its ordination has been to establish a public policy much broader in its influence upon legislation and operation upon judicial proceedings than would have sufficed for the eradication of the ills which attended upon the recovery, or attempted recovery, of debts by restraint of the debtor's person. This policy is inimical alike to the incarceration of a debtor as a means of coercing payment, and

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to his punishment by imprisonment for a failure to pay, at least when such failure results from inability. And hence it is that, while neither the letter of the inhibition, nor the broader policy which is engendered by it and has come to be a part of it, has any application to criminal judgments for fines and costs, *yet it is not within legislative competency to declare the mere nonperformance of a contract of indebtedness a misdemeanor, and punish the commission thereof by imprisonment, directly or indirectly*; for, as said in the notes to *State v. Brewer* (S. C.) (37 Am. St. Rep., 753, 758), "as that which is prohibited to be done directly can not be accomplished by indirection, the legislature can not declare the mere nonperformance of a contract to be a misdemeanor, for that would amount to an attempt to legalize imprisonment for debt." And so, in Tennessee, there was a statute which made it unlawful for any person, firm, corporation, etc., to refuse to cash any checks or scrip issued by them if presented to them within thirty days of the date of issuance, and declared that any such person, etc., so refusing to cash in lawful money such checks or scrip would be guilty of a misdemeanor, and upon conviction should be fined not less than \$10 nor more than \$25. The constitutional provision in that State is that the legislature shall pass no "law authorizing imprisonment for debt in civil cases," terms which would seem to allow greater latitude of legislation in respect of cases of the class we are considering than our own provision; and bringing the statute to the test

of this inhibition, the court said: "The act of the legislature in question, while not directly authorizing imprisonment for debt, does attempt to create a crime for the nonpayment of debts evidenced by checks, scrip, or order, and for such crime provides a penalty which may or may not be followed by imprisonment. In that way and for that reason the act is violative of the spirit if not the letter of the constitutional provision above cited. It is a direct imposition of imprisonment for the nonpayment of debt, and is therefore clearly within the constitutional inhibition." (*State v. Paint Rock Coal & C. Co.*, 92 Tenn., 81.)

And, after analyzing the statute, the court proceeded:

It is a declaration of the baldest and most direct character to one party to a transaction, whereby he has incurred a debt to the other in the name of the State, that, unless he pays that debt, he shall be arrested, held to trial, tried, convicted, fined, and imprisoned at hard labor, *and this obviously not for any taint of criminality in the transaction out of which the debt arose, but purely and simply for the non-payment of the debt.* For this default, and until it is purged either by simply paying the debt and accrued costs before conviction or by working out double the debt and the costs, the debtor may be imprisoned for an indefinite time before trial, merely and only because he does not pay the debt and expenses of putting this coercion upon him, there being no pretense even of ultimately punishing him for

taking the deposit, if the preliminary imprisonment shall have the desired effect of extorting the money he owes the depositor out of him; and if, as is the case here, the compulsion of preliminary imprisonment fails of its intended effect, he may, under the guise of punishing an act *which was not criminal before this statute, and which upon the statutory definition does not necessarily involve abstract criminality or the taint of moral turpitude, and which might up to the very moment of conviction have been shorn of even its factitious criminality by the payment of a debt*, be held to hard labor until his services at the statutory rate shall yield the amount of the debt, and for an equally long time to work out a like sum imposed upon him as an additional penalty for his failure to pay the debt before conviction.

Therefore, the ground upon which the act under consideration was declared unconstitutional was that the alleged offense was in no sense criminal, and justified nothing more than a civil action; and that the provision in the constitution could not be evaded by declaring an act a crime which in fact involved no moral turpitude.

The cases decided by the Supreme Court of the Philippine Islands and cited by plaintiff in error, to wit, *United States v. Hutchins* (5 Phil., 343); *United States v. Lineses* (5 Phil., 631); *United States v. Glefonce* (5 Phil., 570); *United States v. Cortes* (7 Phil., 149); *United States v. Macasaet* (11 Phil., 447, 449), have no bearing upon the question here pre-

sented, as the decision in each case rested on the fact that under the statute applicable no subsidiary punishment was provided for.

II.

It was not error for the Supreme Court of the Philippine Islands to refuse to dismiss the cause without prejudice to the right to institute a civil action for the rendition of accounts.

There is no question that the conversion by plaintiff in error of the funds belonging to Castle Brothers, Wolf & Sons, was a criminal offense, and that regardless of the amount converted. Consequently, it was subject to the criminal jurisdiction of the courts of the Philippine Islands; and while the courts could very properly take cognizance of a civil action and pronounce judgment for the correct amount converted, yet the civil jurisdiction was not exclusive.

For the foregoing reasons it is insisted that the judgment of the Supreme Court of the Philippine Islands should be affirmed.

J. A. FOWLER,
Assistant Attorney-General.

APRIL, 1910.

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FREEMAN *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 156. Submitted April 11, 1910.—Decided May 16, 1910.

Provisions carried into the Philippine bill of rights by the statute of July 1, 1902, c. 1369, 32 Stat. 691, such as "that no person shall be imprisoned for debt," are to be interpreted and enforced according to their well-known meaning at the time. *Kepner v. United States*, 195 U. S. 100.

Statutes relieving from imprisonment for debt, as generally interpreted, relate to commitment of debtors for liability on contracts, and not to enforcement of penal statutes providing for payment of money

as a penalty for commission of an offense and the provision against imprisonment for debt in the Philippine bill of rights as contained in § 5 of the act of July 1, 1902, c. 1369, 32 Stat. 691.

The fact that a money penalty imposed for embezzlement goes to the creditor and not into the public treasury does not make imprisonment for non-payment of the penalty imprisonment for debt; and so held as to § 5, Art. 535, of the Penal Code of the Philippine Islands. Where the statute provides a penalty for embezzlement to the amount proved, to go to the creditor, and a subsidiary sentence of imprisonment in case of non-payment, the court may, without violating fundamental principles of justice, find the amount wrongfully converted for the purpose of fixing sentence in the criminal action, leaving the creditor his remedy in a civil action for any excess due him over the amount of the sentence; and so held as to a conviction for embezzlement under Article 535 of the Penal Code of the Philippine Islands.

THE facts, which involve the validity of a conviction for embezzlement under § 535 of the Philippine Code, are stated in the opinion.

Mr. Aldis B. Browne, Mr. W. A. Kincaid, Mr. Alexander Britton and Mr. Evans Browne for plaintiff in error.

Mr. Assistant Attorney General Fowler for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of error to the Supreme Court of the Philippine Islands, seeking to reverse a judgment of that court affirming a conviction of the plaintiff in error of the crime of *estafa* (embezzlement) growing out of the alleged misappropriation of some 3,500 pesos received by him as manager of the steamship department of Castle Brothers, Wolf & Sons. The sentence of the court of first instance was as follows:

"The court therefore finds the defendant, Otis G. Freeman, guilty of embezzlement of the sum of p3,500 Phil-

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ippines currency, as charged in the complaint, the property of Castle Bros., Wolf & Sons, and does sentence him to imprisonment, *presidio correccional*, in the insular prison of Bilibid, for the period of one year and nine months, and to restore to said Castle Bros., Wolf & Sons the sum of p3,500 Philippines currency, or in lieu thereof to suffer subsidiary imprisonment for the period of seven months and to pay the costs of prosecution."

Upon appeal to the Supreme Court of the Philippine Islands that court, after reviewing the testimony, said:

"This finding, of course, will in no way estop the said firm of Castle Bros., Wolf & Sons from recovering in a civil action from the defendant any sum or sums in excess of this amount which are found to be due to the said firm. The only charge (change) which this finding makes in the conclusion of the lower court is in the amount of money which must be returned to the firm of Castle Bros., Wolf & Sons by virtue of this sentence.

"It is the judgment of this court that the sentence of the lower court be affirmed with this modification, and that the defendant be sentenced to be imprisoned for a period of one year and nine months of *presidio correccional*, and to restore to Castle Bros., Wolf & Sons the sum of p2,078.50, or in lieu thereof to suffer subsidiary imprisonment for a period not to exceed one-third of the principal penalty, and to pay the costs."

The statute of the Philippine Islands defining the crime is article 535 of the Philippine Code:

"(1) Philippine Penal Code, article 535:

" 'The following shall incur the penalties of the preceding articles:

* * * * *

" '5. Those who, to the prejudice of another, shall appropriate or misapply any money, goods, or any kind of personal property which they may have received as a deposit on commission for administration or in any other

character producing the obligation to deliver or return the same, or who shall deny having received it.' "

Other pertinent articles of the Philippine Code are as follows:

"(2) Philippine Penal Code, article 534:

" 'A person who shall defraud another in the substance, quantity, or quality of things he may deliver to him, by virtue of an obligation, shall be punished—

* * * * *

" '2. With that (the penalty) of *arresto mayor* in its medium degree to *presidio correccional* in its minimum degree if it should exceed 250 pesetas and not be more than 6,250 pesetas.'

"(3) Philippine Penal Code, article 28:

* * * * *

" 'Those [penalties] of *presidio correccional* and *prision correccional* shall last from six months and one day to six years.

* * * * *

" 'That of *arresto mayor* shall last from one month and one day to six months.'

"(4) Philippine Penal Code, article 49:

" 'In case the property of the person punished should not be sufficient to cover all the pecuniary liabilities they shall be satisfied in the following order:

" '1. Reparation of the injury caused and indemnification of damages.

" '2. Indemnification to the State for the amount of stamped paper and other expenses which may have been incurred on his account in the cause.

" '3. The costs of the private accuser.

" '4. Other costs of procedure, including those of the defense of the person prosecuted, without preference among the persons interested.

" '5. The fine.

" 'Should the crime have been of those which can be

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prosecuted only at the instance of a party, the cost of the private accuser shall be satisfied in preference to the indemnification to the State.'

"(5) Philippine Penal Code, article 50:

" 'If the person sentenced should not have property to satisfy the pecuniary liabilities included in Nos. 1, 3 and 5 of the preceding article, he shall be subject to a subsidiary personal liability at the rate of one day for every 12½ pesetas, according to the following rule:

" '1. If the principal penalty imposed is to be undergone by the criminal confined in a penal institution, he shall continue therein, although said detention cannot exceed one-third of the term of the sentence, and in no case can it exceed one year.

* * * * *

" '(6) Philippine Penal Code, article 52:

" 'The personal liability which the criminal may have incurred by reason of insolvency shall not exempt him from the reparation of the injury caused and the indemnification of damages if his pecuniary circumstances should improve; but it shall exempt him from the other pecuniary liabilities included in Nos. 3 and 5 of article 49.' "

It is the contention of the plaintiff in error that the judgment of the Supreme Court of the Philippine Islands should be reversed for two reasons, first, because the judgment was in substance and effect an imprisonment for debt; second, because the court should have dismissed the case without prejudice to the right to institute a civil action for the rendition of accounts.

As to the first contention, that the judgment and sentence amounted to imprisonment for debt:—The act of July 1, 1902, providing for the administration of the affairs of the civil government of the Philippine Islands, 32 Stat. 691, provides among other things in § 5 thereof: "That no person shall be imprisoned for debt." This provision was carried to the Philippine Islands in the

statute quoted with a well-known meaning, as understood when thus adopted into the bill of rights for the government of the Philippines and must be so interpreted and enforced. *Kepner v. United States*, 195 U. S. 100, 124.

Statutes relieving from imprisonment for debt were not intended to take away the right to enforce criminal statutes and punish wrongful embezzlements or conversions of money. It was not the purpose of this class of legislation to interfere with the enforcement of such penal statutes, although it provides for the payment of money as a penalty for the commission of an offense. Such laws are rather intended to prevent the commitment of debtors to prison for liabilities arising upon their contracts. *McCool v. State*, 23 Indiana, 129; *Musser v. Stewart*, 21 Oh. St. 353; *Ex parte Cottrell*, 13 Nebraska, 193; *In re Ebenhack*, 17 Kansas, 618, 622.

This general principle does not seem to be controverted by the learned counsel for the plaintiff in error, and the argument is, that inasmuch as the money adjudged is to go to the creditor, and not into the public treasury, imprisonment for the non-payment of such sum is an imprisonment for debt. But we think that an examination of the statutes of the Philippines and the judgment of the Supreme Court shows that the imposition of the money penalty was by way of punishment for the offense committed, and not a requirement to satisfy a debt contractual in its nature or be imprisoned in default of payment.

Section 5, article 535, of the Penal Code provides that those who, to the prejudice of another, shall appropriate or misapply any money, goods or any kind of personal property which they may have received as a deposit on commission for administration, or in any other character, producing the obligation to deliver or return the same, or who shall deny having received it, shall incur certain

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penalties. As a further means of punishing the act done in violation of the statute he may, under the Philippine Code, be made to suffer a subsidiary imprisonment for a term not to exceed one-third of the principal penalty in lieu of the restoration of the sum found to be embezzled. The sentence of the Supreme Court of the Philippine Islands, including the imprisonment in lieu of the payment of the sum found due, was because of the conviction for the violation of this statute—in other words, the money payment was part of the punishment and was not imposed as an imprisonment for non-payment of the debt, regardless of the criminal offense committed. The sentence and each part of it was imposed because of the conviction of the defendant of the criminal offense charged.

This situation is not changed because the sentence provides for a release from the subsidiary imprisonment upon payment of the money wrongfully converted. The sentence imposed, nevertheless, includes the requirement to pay money because of the conviction of the offense. The requirement that there shall be no imprisonment for debt was intended to prevent the resort to that remedy for the collection of contract debts, and not to prevent the State from imposing a sentence for crime which should require the restoration of the sum of money wrongfully converted in violation of a criminal statute. The non-payment of the money is a condition upon which the punishment is imposed. *State of Maryland v. Nicholson*, 67 Maryland, 1.

We do not think that the sentence and judgment violated the statute providing that no person shall be imprisoned for debt.

As to the second objection, that the court should have dismissed the cause without prejudice to the right of instituting a civil action, the argument seems to be that this should be so because the payment of the money adjudged or suffering the "subsidiary imprisonment" im-

posed would not, as the Supreme Court adjudged, bar the creditor from a civil action to recover any sum which he might prove to be due in excess of the judgment rendered in the present case. "In other words," says the learned counsel, "imprisonment will satisfy (and therefore discharge) the judgment here rendered, leaving another and wholly civil action open to the complainants to recover any additional sum arising out of the same cause of action." This possibility is said to be so wholly unjust that it ought not to be permitted to exist in any country subject to American jurisdiction. But we fail to appreciate the weight of this argument. We see no reason why the court may not, for the purpose of the criminal proceedings, find the amount wrongfully converted by the defendant for the purpose of fixing the sentence in this case, leaving the firm defrauded to recover in a civil action any sum or sums in excess of that amount which may be found due and remain unpaid to them. We are unable to perceive in this action such violation of the fundamental principles of justice as required the dismissal of the criminal action, leaving the parties complaining to the remedies of a civil suit.

We find no error in the judgment of the court below, and the same is affirmed.

Affirmed.